IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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**No. 73-5284**

DOUGLAS DORSZYNSKI,

*Petitioner,*

—v.—

UNITED STATES,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS


| | Page |
|---|---|
| Docket Entries | 1 |
| Proceedings upon Filing Information, Arraignment, Plea and Sentence | 6 |
| Motion Dated April 7, 1972 by Attorney Michael Jan Steckelis | 14 |
| Affidavit in Support of Steckelis Motion | 15 |
| Motion for Release from Custody Pursuant to 28 U.S.C. Sec. 2255 Dated April 27, 1972 | 16 |
| Motion to Withdraw a Plea of Guilty dated April 27, 1972 | 17 |
| Motion for Reduction of Sentence Dated April 27, 1972 | 17 |

Page

Supplemental Motion to Withdraw a Plea of Guilty, for a Reduction of Sentence, and to be Released from Custody Pursuant to 28 U.S.C. Sec. 2255 Dated May 1, 1972 ..... 18

Proceedings Upon Hearing to Vacate Plea of Guilty, Release from Custody Pursuant to 28 U.S.C. Sec. 2255, For Reduction of Sentence, and on Supplemental Motion to Withdraw Plea of Guilty, for a Reduction of Sentence and to be Released From Custody Pursuant to 28 U.S.C. Sec. 2255 Dated June 2, 1972 ..... 18

Douglas R. Dorszynski

Direct Examination by Mr. Friebert ..... 19

Cross Examination by Mr. Stadtmueller ..... 26

Re-direct Examination by Mr. Friebert ..... 28

Examination by the Court ..... 28

William W. Raebel

Direct Examination by Mr. Stadtmueller ..... 29

Cross Examination by Mr. Friebert ..... 32

Examination by the Court ..... 36

Argument by Mr. Friebert ..... 37

Argument by Mr. Stadtmueller ..... 42

Decision of the Court ..... 44

Proceedings on Revocation of Probation ..... 47

Statement by the Court ..... 47

Statement by Mr. Friebert ..... 48

Decision of the Court ..... 50

Further statement by Mr. Friebert ..... 50

Colloquy by the Court and Mr. Friebert ..... 51

Conditions of Probation ..... 53

Opinion of the United States Court of Appeals for the 7th Circuit dated July 20, 1973 ..... 55

Order of the Supreme Court of the United States granting leave to proceed in forma pauperis and granting petition for writ of certiorari ..... 61

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

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No. 72-5284

DOUGLAS RAYMOND DORSZYNSKI, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

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# APPENDIX

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## DOCKET ENTRIES

| Document No. | Date | Proceedings |
|---|---|---|
| | 1971 | |
| 1-3 | Oct. 21 | Record of proceedings before Judge John W. Reynolds as magistrate, with complaint, warrant as to deft. DORSZYNSKI executed 1/20/71, warrant as to deft. STEINHOFF executed 10/26/71, appearance bonds as to each deft. in sum of $1,500.00 O/R. |
| | 1972 | |
| 4 | Feb. 14 | HEARING on filing information, Information filed, arr., plea and imposition of sentence as to both defts. (MLG): DORSZYNSKI: Deft. arraigned. Plea of guilty entered. Court finds a basis in fact for the plea and enters judgment of conviction. Pre-sentence |

## DOCKET ENTRIES

| Document No. | Date | Proceedings |
|---|---|---|
| | 1972 | |
| 4 | Feb. 14 | report previously ordered. SENTENCE: Deft. committed to imprisonment for one year, to serve the first 90 days in a jail-type institution—execution of remainder of sentence suspended and deft. placed on probation for two years to commence upon his release from physical custody. Judgment, commitment and order of probation issued. STEINHOFF: Deft. arraigned. Plea of guilty entered. Court finds a basis in fact for the plea and enters judgment of conviction. Pre-sentence report previously ordered. SENTENCE: Deft. committed to imprisonment for one year, to serve the first 60 days in a jail-type institution-execution of remainder of sentence suspended and deft. placed on probation for 2 yrs., to commence upon his release from physical custody. Judgment, commitment and order or probation issued. |
| 5 | Feb. 24 | Judgment and commitment as to each deft. ret'd executed 2/14/72. |
| 6 | Feb. 24 | Transcript of 2/14/72 proceedings. |
| 7 | Feb. 25 | Defts' unrated letters, treated by the court as motions for reduction of sentence under Rule 35, and orders (MLG) denying motions. |
| 8 | Mar. 2 | Defts' motion for reduction of sentence pursuant to Rule 35 F. R. Cr. P. |
| 9 | Mar. 2 | Order (MLG) denying defts' motion for reduction of sentence. |

DOCKET ENTRIES

| Document No. | Date | Proceedings |
|---|---|---|
| | 1972 | |
| 10 | Apr. 14 | Motion of deft. DORSZYNSKI to withdraw plea of guilty and for jury trial. |
| 11 | Apr. 18 | Notice of substitution of Samson, Friebert, Sutton & Finerty as counsel for deft. DORSZYNSKI. |
| 12 | Apr. 18 | Motion of Deft. DORSZYNSKI for bail. |
| 13 | Apr. 20 | Stipulation and order for substitution of Samson, Friebert, Sutton & Finerty as attys. in place of Michael Jan Steckelis for deft. DORSZYNSKI. |
| 14 | Apr. 25 | Order (MLG) denying deft. DORSZYNSKI's motion for release from custody on bail. |
| | May 12 | Govt's reply memorandum. |
| 20 | May 9 | Certified copy of order of Court of Appeals, denying deft. DORSZNYSKI'S emergency application for bail. |
| 15 | May 1 | Motion to deft. DORSZYNSKI to withdraw plea of guilty. |
| 16 | May 1 | Motion of deft. DORSZYNSKI for release from custody pursuant to 28 U.S.C. Sec. 2255. |
| 17 | May 1 | Renewed motion of DORSZYNSKI for bail. |
| 18 | May 1 | Motion of deft. DORSZYNSKI for reduction of sentence. |
| 19 | May 1 | Supplemental motion of DORSZYNSKI to withdraw plea of guilty, for reduction of sentence and to be released from custody pursuant to 28 U.S.C. Sec. 2255. |

| Document No. | Date | Proceedings |
|---|---|---|
| | 1972 | |
| 21 | June 2 | HEARING on motion of DORSZYNSKI to vacate plea of guilty (MLG); Motion to vacate plea of guilty denied. Motion to reduce sentence denied. U.S. Attorney to submit order. Court orders revocation of deft's probation. Deft's request for hearing on revocation denied. Request for stay pending appeal denied. |
| 22 | June 2 | Deft's motion and order granting permission to enter document into file (Conditions of Probation). |
| 23 | June 2 | Deft's motion and order allowing him to appeal in forma pauperis, and transcript of proceedings shall be supplied at government expense. |
| 24 | June 2 | Notice of appeal of deft. DORSZYNSKI filed. |
| 25 | June 1 | Transcript of 10/21/71 proceedings before Judge John W. Reynolds acting as magistrate. |
| | June 2 | Record on appeal forwarded to U.S. Court of Appeals 7th Circuit, Chicago, Illinois. |
| 26 | June 2 | Appearance bond in sum of $1,000.00 O/R, pursuant to order of Judge Thomas E. Fairchild. |
| 27 | June 5 | Certified copy of order of Court of Appeals, Seventh Circuit, granting application of deft. to be released on $500.00 O/R bond. |

| Document No. | Date | Proceedings |
|---|---|---|
| | 1972 | |
| 28 | June 7 | Order (MLG) denying motions of deft. DORSZYNSKI. |
| | June 8 | Appearance bond filed 6/2/72 and order filed 6/7/72 forwarded to U.S. Court of Appeals, 7th Circuit, Chicago, Illinois to be included with record on appeal. |
| 29 | June 21 | Transcript of proceedings upon hearing to vacate plea of guilty. |
| | June 23 | Voucher of Carol Zuber (for transcript) mailed to AO. Copy filed. |
| | 1973 | |
| 30 | Aug. 13 | Mandate of the Court of Appeals, reversing the order revoking deft's probation, and affirming orders denying other motions. |
| | Aug. 13 | Appeal record received—1 vol pleadings; 1 vol transcript; supplement to record. |
| 31 | Dec. 17 | Copy of order of the Supreme Court granting petition of deft. DORSZYNSKI for writ of certiorari and for leave to proceed in forma pauperis. |
| 32 | | Certificate of Clerk. |

PROCEEDINGS UPON FILING INFORMATION, ARRAIGNMENT, PLEA AND SENTENCE

COURT CLERK: United States v. Douglas Raymond Dorszynski and Barry Steinhoff. There is no case number.

This proceeding is for the purpose of filing information, arraignment, plea and sentence.

May we have appearances, please?

MR. STADTMUELLER: Joseph P. Stadtmueller appearing for the United States.

MR. PODELL: Richard Podell appearing for the defendants, and both the defendants appearing in person.

MR. STADTMUELLER: Your Honor, I have caused to be filed with your court this morning a One-Count Information charging these two defendants with unlawful and knowing possession of a thousand tablets of Lysergic Acid Diethylamide, which is commonly known as "LSD," a Schedule I Controlled Substance, not having previously obtained such substance directly from or pursuant to a valid prescription or order by a practitioner while said practitioner was acting in the course of his professional practice, all in violation of Section 844(a), Title 21, United States Code and Section 2, Title 18, United States Code.

Under the offenses charged, these defendants face maximum penalties of up to one year in prison and a fine of up to $5,000.00 or both. In addition, as one or both of these defendants may be under the age of 26, they may also be subject to the Federal Youth Corrections Act.

COURT: Mr. Podell?

MR. PODELL: Your Honor, at this time both defendants would enter a plea of "Guilty" to the charges.

COURT: I have to question each of them.

You gentlemen were in court earlier when you heard me say before accepting a plea I must be satisfied it is understandably made and voluntary.

Which is Mr. Dorszynski?

DEFENDANT DORSZYNSKI: Here (Raising hand).

BY THE COURT, OF DOUGLAS RAYMOND DORSZYNSKI:

Q. Your full name, sir?
A. Douglas Raymond Dorszynski.
Q. How old are you?
A. Nineteen.
Q. How much schooling have you had?
A. In my second year of college.
Q. Has there ever been an inquiry into your mental capacity?
A. No, sir.
Q. What do you understand the charge to be against you?
A. Possession of LSD.
COURT: Is it a single count?
MR. STADTMUELLER: You, Your Honor, it is.
COURT:
Q. What do you understand to be the permissible penalty?
A. $5000.00 fine and one year in prison.
Q. Or both?
A. Or both, right.
Q. Is that correct?
MR. STADTMUELLER: Yes, Your Honor.
COURT: Is it a felony?
MR. STADTMUELLER: No, it is not, Your Honor; it is a misdemeanor.

BY THE COURT, OF DOUGLAS RAYMOND DORSZYNSKI:

Q. Now you have a right to a trial, trial before a jury, a right to have your witnesses against you appear so you may be confronted by them. You are presumed innocent until and unless the Government is able to prove beyond a reasonable doubt that you are guilty. If you enter a plea of guilty, you waive all that.
A. Yes, sir.
Q. Do you desire to do that?
A. Yes, I do, sir.
Q. Has anybody exercised any pressure on you to plead guilty?

A. No, sir.

Q. Did anybody make any promises to you what would happen if you did not plead guilty?

A. No, sir.

Q. Any threats or promises?

A. No, sir.

Q. Do you think arrangements have been made with the court as to what your penalty would be?

A. No.

Q. So, subject to the maximum limitation, you understand you might get anything less than or as high as that, but nothing more; is that correct?

A. Yes, sir.

Q. Can't hear you.

A. Yes, sir.

Q. Do you think you have had an ample opportunity to talk to your attorney and understand what's going on?

A. Yes, sir.

Q. You desire to plead guilty?

A. Yes, I do sir.

BY THE COURT, OF BARRY STEINHOFF:

Q. Now you are Barry Steinhoff?

A. Yes, sir.

Q. How old are you, Mr. Steinhoff?

A. Nineteen.

Q. How much schooling have you had, sir?

A. I am at MATC now, my first year.

Q. Finish high school?

A. No—about a half a year behind.

Q. Has there ever been a question raised as to your mental capacity?

A. No, sir.

Q. Tell me, in your own words, what you think you are charged with here.

A. Possession of dangerous drugs.

Q. And what kind of drugs?

A. LSD.

Q. What do you understand the maximum penalty to be?

A. $5000.00 and/or one year.

Q. Do you believe that any arrangement has been made with the court as to what your actual penalty will turn out to be?

A. No, sir.

Q. Anything up to but not more than the maximum is what might be imposed upon you. Do you understand that?

A. Yes.

Q. Now, you have heard me explain to Mr. Dorszynski that if a plea is accepted you'd be waiving a trial and waiving all the constitutional rights, such as to be confronted by the witnesses against you, to have a jury determine your guilt or innocence, to have the presumption of innocence applied to you?

A. Yes, sir.

Q. You want to waive all that?

A. Yes, sir.

Q. You think you understand the proceedings?

A. Yes, sir.

Q. You are satisfied that nobody has pressured you or promised anything to you that has induced you to plead guilty?

A. Yes, sir.

Q. And do you feel you have had an ample opportunity to talk to Mr. Podell about this?

A. Yes, sir.

COURT: What would the Government be prepared to prove as to both defendants if the case went to trial?

MR. STADTMUELLER: Your Honor, in this matter the Government would be prepared to establish through the testimony of Michael J. Stricher, a Special Agent employed by the Justice Department, Bureau of Narcotics and Dangerous Drugs, that he, Stricher, received information from an unidentified source that an individual by the name of Barry, later identified as Barry Steinhoff, has large quantities of LSD available and that he was selling them for approximately $700.00 per 1,000 dosage units.

On October 18, 1971, Mr. Stricher would testify that he made initial contact with Mr. Steinhoff by telephoning him at his residence and arranged for future purchases

of LSD. The next day a sample was delivered to Mr. Stricher by Mr. Steinhoff, and subsequent thereto, namely, on October 20, 1971, Special Agent Stricher contacted Steinhoff telephonically and arranged to meet him and his source of supply at 6:00 o'clock that evening, and at that time Mr. Steinhoff appeared with Mr. Dorszynski and met Mr. Stricher at Frosty's Grill in the City of Milwaukee, at which time the 1,000 tablets were transferred to Mr. Stricher and the defendants were placed under arrest with no sale actually having been consummated because no money changed hands.

The testimony of Mr. Dennis Korte, a forensic chemist employed by the Department of Justice, Bureau of Narcotics and Dangerous Drugs, would establish that on October 21, 1971, he conducted a chemical analysis of the tablets purported to be LSD and his tests proved that they were in fact Lysergic Acid Diethylamide (LSD), a Schedule I Controlled Substance.

COURT: Mr. Dorszynski, if that proof were offered, would it be substantially correct?

DEFENDANT DORSZYNSKI: Yes, it would, sir.

COURT: I ask you the same question, Mr. Steinhoff: If that proof were offered, would it be substantially correct?

DEFENDANT STEINHOFF: Yes, sir.

COURT: Have you satisfied yourself, Mr. Podell, that there are no technical defenses which your clients might not be familiar with?

MR. PODELL: Yes, I am, Your Honor.

COURT: You are satisfied that each of the two defendants understands the proceedings and without undue —without any coercion or any misrepresentations on the part of anyone, that each of them is desirous of pleading guilty?

MR. PODELL: Yes, I am, Your Honor.

We have discussed this matter at great length with numerous conferences, and I feel this is their wish and desire, and in their best interest, Your Honor.

COURT: All right, the court does accept the pleas of guilty in each case being satisfied that both Mr. Dorszynski and Mr. Steinhoff understands these proceedings, that

they are knowledgeably and intelligently desirous of waiving their constitutional rights, and that absent any coercion or promises they intelligently and knowledgeably desire to enter pleas of guilty with full awareness of the circumstances and the permissible consequences and, accordingly, the please of guilty are now accepted and judgments of convictions are entered as to both the defendant Dorszynski and the defendant Steinhoff.

Now, do I understand that sentencing is desired to proceed today?

MR. PODELL: That is correct, Your Honor.

COURT: And, again, Mr. Zastrow, are the Presentence Reports prepared?

MR. ZASTROW: We have completed the reports and they have been retained in our files until the plea of guilty was entered.

COURT: Thank you.

I have received now the Presentence Report and since —have you read it?

MR. PODELL: Yes, I have, Your Honor.

COURT: I have not read them, so we will have to adjourn while I take an opportunity to do that.

I think the record should also disclose that the court is satisfied that there is a basis in fact for the pleas of guilty in this case.

We will stand recessed.

(Whereupon a recess was taken, and after the recess the following proceedings were had:)

COURT CLERK: United States vs. Douglas Raymond Dorszynski. There is no case number.

This proceeding is for imposition of sentence. May we have the appearances, please?

MR. STADTMUELLER: Joseph P. Stadtmueller appearing for the United States.

MR. PODELL: Richard Podell appearing for the defendant, and the defendant himself.

COURT: Mr. Steinhoff, you can sit down for a few moments. I will entertain the sentence of Mr. Dorszynski at this moment.

Douglas Raymond Dorszynski, earlier today you entered a plea of guilty and were adjudged guilty as to a One-Count Information charging possession of 1,000 tablets of Lysergic Acid Diethylamide in violation of Section 844(a), Title 21 of the Code and Section 2, Title 18 of the Code.

Do you have any reason to advance why this court should not now proceed with the imposition of sentence?

DEFENDANT: No, I don't, Your Honor.

COURT: Is there anything you want to say in mitigation of sentence?

Do you understand what I mean by that?

DEFENDANT: Yes, there is a couple thing I'd like to say.

First, I know that it was stupid and it was wrong, and I cooperated with the arresting agency fully because of that, and I won't do it again.

COURT: Mr. Podell?

MR. PODELL: Yes, Your Honor, I'd like to just highlight a few points which I think are very material here, Your Honor.

I have discussed this matter on more than one occasion with the defendant, and I have informed him that under similar circumstances that it is highly probable that a defendant would receive a period of time in jail, would be incarcerated, because these are serious offenses. But, Your Honor, I feel that this case is different than the ordinary case under similar circumstances in that you have a young lad here who is just nineteen years of age with absolutely no prior record—nothing—and he does not come from a home which is easy, as many of the others who sometimes get in trouble.

This yound lad's father died six years ago; there are three other children at home; he had to work part-time going to school—sophomore at UWM, in good standing.

Your Honor, I do not see any reason, or any justification, or purpose that would benefit sending this young lad to jail.

When he said he has cooperated one hundred per cent with the authorities, that is exactly correct, Your Honor;

and I do not think that the Presentence Report fully went into this, Your Honor.

Officer Rabel of the Dangerous Drugs and Narcotics had this boy in his office on many occasions—fifteen to twenty times—helping him out; and he came down every time and helped out one hundred per cent.

You have had a person who, with no previous record, comes from a home which is not easy, three other children, no father, he has been working and in school, and he has admitted he did this—it was a stupid thing—but, Your Honor, he has tried to the best of his ability to make amends.

His mother is in court today, and I have talked to her on numerous occasions.

Your Honor, I would ask that the Court give him an opportunity to prove to this Court that he can make amends and that he will no longer or never again return to this court; and I'd ask that he be placed under probation—on probation under the Youth Corrections Act.

COURT: I will now proceed with the formal sentence.

Douglas Raymond Dorszynski, as of today you entered a plea of guilty and were adjudged guilty as to the offense of knowingly and intentionally possessing 1,000 tablets of Lysergic Acid Diethylamide in violation of 21 U.S. Code, 844(a).

The Court having asked the defendant why judgment should not now be pronounced, and no cause to the contrary appearing to the Court, and the defendant and his attorney having made statements in mitigation of sentence, it is the sentence and judgment of this court that you, Douglas Raymond Dorszynski, be committed to the custody of the Attorney General of the United States or his authorized representative for a period of one (1) year.

It is the further order of this court that the defendant be confined in a jail-type or treatment institution for a period of ninety (90) days and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for a period of two (2) years, probation to commence upon defendant's physical release from custody.

That's all of the formal sentence.

Now, I wanted to advise Mr. Podell that the record, in my opinion, fully acknowledges the fact that there was cooperation—

MR. PODELL: Your Honor, my only—

COURT: Let me finish my statement. (Continuing) —that there was cooperation with the prosecution and that Mr. Rabel reported—who is a narcotic agent I understand—Mr. Dorszynski had cooperated with the agents, and further that Mr. Stadtmueller represented that the defendants were charged with misdemeanor only because of their cooperation, so that that point was completely known to the court.

Something you want to say?

MR. PODELL: Yes, Your Honor. That when I read the Presentence Report and I checked with Mr. Rabel, he informed me at that time that no one had mentioned or even discussed the matter with him, and I only pointed this out, Your Honor, because I feel that this lad, with no prior record whatsoever, went out of his way and to help out as much as possible realizing it was a serious offense.

COURT: Thank you. That's all.

## Motion Dated April 7, 1972 By Attorney Michael Jan Steckelis

(Formal parts omitted)

Comes now Michael Jan Steckelis, 326 South Hamilton Street, Madison, Wisconsin, attorney for the above-named defendant, and respectfully moves the court as follows, to wit:

1. That said defendant be allowed to withdraw his plea of guilty in the above entitled cause.

2. That a trial be held in the above entitled cause before a twelve (12) man jury.

3. That said actions be taken because (a) said defendant had a misapprehension of the law, the facts surrounding his case, and the consequences of a conviction

for the alleged crimes; (b) said defendant was persuaded by arguments of taking the most expeditious alternative rather than arguments of guilt or innocence; and (c) such action would be in the furtherance of justice.

### Affidavit In Support of Steckelis Motion

(Formal parts omitted)

Michael Jan Steckelis, being first duly sworn, on oath deposes and says:

1. That he is the attorney for the above named defendant, Douglas Raymond Dorszynski.

2. That your affiant is informed and believes that on February 14, 1972 said defendant plead guilty in United States District Court Eastern District of Wisconsin to a charge of unlawful and knowing possession of a thousand tablets of Lysergic Acid Diethylomide, a Schedule I Controlled Substance, not having been previously obtained such substance directly from or pursuant to a valid prescription or order by a practitioner while said practitioner was acting in the course of his professional practice, all in violation of Sections 844(a), Title 21, United States Code and Section 2, Title 18, United States Code.

3. That your affiant is informed and believes that the judge presiding in the above-entitled cause, the Honorable Myron L. Gordon, sentenced said defendant to be committed to custody of the Attorney General of the United States or his authorized representative for a period of one (1) year, that he be confined in a jail or institution for ninety (90) days, and that the remainder of the sentence be suspended and the defendant placed on probation for two (2) years.

4. That your affiant is informed and believes that said defendant had a misapprehension of the law, the facts surrounding his case, and the consequences of a conviction for this crime.

5. That your affiant is informed and believes that said defendant was motivated by statements of his attorney and the United States Attorney that pleading guilty was his most expeditious alternative under the circumstances and not by a true belief in his own guilt.

6. That your affiant believes that justice could be better served if questions of said defendant's guilt were left to a jury.

7. That your affiant makes this affidavit in support of a requested order allowing the defendant to withdraw his plea of guilty.

MOTION FOR RELEASE FROM CUSTODY PURSUANT TO 28 U.S.C. SEC. 2255 DATED APRIL 27, 1972

(Formal parts omitted)

The defendant DOUGLAS DORSZYNSKI by his attorneys SAMSON, FRIEBERT, SUTTON & FINERTY by ROBERT H. FRIEBERT hereby moves the court for the entry of an order releasing the defendant from custody pursuant to 28 U.S.C. Sec. 2255 on the grounds that the defendant's plea of guilty was not voluntarily entered and that said plea was the product of promises, inducements and coercion in that the defendant was told by Officer Rabel from the Dangerous Drugs and Narcotics Division that he would receive a sentence of probation under the Federal Youth Corrections Act if he cooperated with the Federal Authorities and further if he entered a plea of guilty to the charge. Furthermore, the plea was in violation of Rule 11 and *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969) in that the defendant was not advised by the court that by entering a plea of guilty he was waiving his privilege against self-incrimination.

The defendant respectfully requests that the court cause notice to be served upon the United States Attorney and grant a fact finding hearing. The record in this case does not disclose that the defendant is entitled to no relief. The defendant respectfully asserts that his responses to inquiries from the court that he was not

promised anything if he pled guilty and was not told what his penalty would be were prompted by the promises asserted above. The defendant respectfully alleges that he was told to respond in this fashion.

MOTION TO WITHDRAW A PLEA OF GUILTY
DATED APRIL 27, 1972

(Formal parts omitted)

The defendant DOUGLAS DORSZYNSKI by his attorneys SAMSON, FRIEBERT, SUTTON & FINERTY by ROBERT H. FRIEBERT hereby moves the court pursuant to Rule 32(d) for the entry of an order withdrawing his plea of guilty to correct a manifest injustice. The defendant respectfully asserts that his plea of guilty was coerced and was the product of promises and inducements made to him by Officer Rabel of the Dangerous Drugs and Narcotics Division to the effect that if he cooperated with the Federal Authorities and entered a plea of guilty that he would receive a sentence of probation pursuant to the provisions of Federal Youth Corrections Act. As a result of said inducements of Officer Rabel, the defendant asserts that he cooperated with the Federal Officers and entered a plea.

The defendant also asserts that he is entitled to withdraw his plea of guilty because he was not advised by the court that the entry of the plea of guilty had a result of waiving his privilege against compulsory self-incrimination as required by Rule 11 and *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969).

MOTION FOR REDUCTION OF SENTENCE
DATED APRIL 27, 1972

(Formal parts omitted)

The defendant DOUGLAS DORSZYNSKI by his attorneys SAMSON, FRIEBERT, SUTTON & FINERTY by ROBERT H. FRIEBERT hereby moves the court pursuant to Rule 35 for the entry of an Order reducing the sentence previously imposed upon him.

SUPPLEMENTAL MOTION TO WITHDRAW A PLEA OF GUILTY, FOR A REDUCTION OF SENTENCE, AND TO BE RELEASED FROM CUSTODY PURSUANT TO 28 U.S.C. SEC. 2255 DATED MAY 1, 1972

(Formal parts omitted)

The defendant DOUG DORSZYNSKI, by his attorneys SAMSON, FRIEBERT, SUTTON & FINERTY, by ROBERT H. FRIEBERT, hereby additionally moves the court for relief pursuant to Rule 32(d), Rule 35, and 28 U.S.C., Sec. 2255, on the additional grounds that the defendant was not advised that he was subjecting himself to incarceration for a period of six years by entering a plea of guilty pursuant to the Federal Youth Corrections Act in violation of Rule 11, and, further, the court did not make any finding that the defendant would not derive benefit from treatment under 18 U.S.C., Sec. 5010 (b) or (c), in violation of 18 U.S.C., Sec. 5010 (d). The court was, therefore, without jurisdiction to impose a sentence as provided in 21 U.S.C., Sec. 844 (a). See *United States* v. *Waters*, 437 F.2d 722, 724 (D.C. 1970) and *United States* v. *Howard*, 449 F.2d 1086, 1092, (D.C. 1971).

PROCEEDINGS UPON HEARING TO VACATE PLEA OF GUILTY, RELEASE FROM CUSTODY PURSUANT TO 28 U.S.C. SEC. 2255, FOR REDUCTION OF SENTENCE, AND ON SUPPLEMENTAL MOTION TO WITHDRAW PLEA OF GUILTY, FOR A REDUCTION OF SENTENCE AND TO BE RELEASED FROM CUSTODY PURSUANT TO 28 U.S.C. SEC. 2255 DATED JUNE 2, 1972

COURT: It's my intention to dispose of all pending motions in this matter; and if counsel have any evidence to present in connection with the pending motions, anything they may choose to, proceed.

MR. FRIEBERT: Your Honor, there were — there would be a necessity for an evidentiary hearing with respect to the—that aspect of the Defendant's motion to withdraw a plea of guilty, or his 2255 motion, which asserts that there were certain commitments made to him

with respect to his plea. That's the only motion which would compel testimony.

I believe that the other motions perhaps if resolved prior to that, might obviate the necessity of such a fact hearing. For example, if the Court were to consider the motion favorable to the Defendant with respect to his motion to adjust sentence, I think that that would obviate the necessity of a fact hearing. Likewise,—

COURT: I think we should hold our fact hearing, Mr. Friebert.

MR. FRIEBERT: A—

COURT: That's why we scheduled this hearing this morning. If you have any facts you want to adduce, this is the time.

MR. FRIEBERT: I would like to, if I may, address myself to another aspect of the motions. There is an assertion that the record itself does not disclose a compliance with Federal Rule 11 and with *McCarthy* v *United States.*

COURT: That's a question of law, though; and I don't think there is any problem the Court has to take evidence on. Would you please proceed with your proof?

MR. FRIEBERT: Can I ask that Mr. Raebel be asked to leave the courtroom during the course of this testimony?

COURT: Any objection to that?

MR. STADTMUELLER: I have no objection, Your Honor.

MR. FRIEBERT: Mr. Dorszynski.

DOUGLAS DORSZYNSKI, having been first duly sworn on oath, testified as follows:

COURT CLERK: Would you please state your full name and spell your last name for the record?

THE WITNESS: Douglas Raymond Dorszynski, D-o-r-s-z-y-n-s-k-i.

COURT CLERK: Okay, please be seated.

DIRECT EXAMINATION

BY MR. FRIEBERT:

Q Would you state your name, age, and address?

A Douglas Raymond Dorszynski, I'm 20 years old, and my address is 2597 South Austin Street.

Q Mr. Dorszynski, you are the Defendant in this case; is that correct?

A Yes, sir, it is correct.

Q And do you recall appearing before this Court on February 14, 1972?

A Yes, I do.

Q And at that time, you were represented by counsel; is that right?

A Yes, it is.

Q And what was his name?

A Mr. Richard Podell.

Q Now, on that date you entered a plea of guilty; is that correct?

A Correct, right.

Q And were sentenced; is that correct?

A Also correct.

Q And as part of that sentence you were committed to a term of 90 days, which you have now completed; is that correct?

A Yes, it is correct.

COURT: That's not quite correct, is it?

MR. FRIEBERT: I was about to say he is presently on probation.

COURT: All right. Go ahead.

MR. FRIEBERT:

Q And you are presently now on probation in accordance with that sentence?

COURT: He was not sentenced to 90 days. He was sentenced to a year.

MR. FRIEBERT: I'm sorry.

COURT: And I'm nitpicking, of course, but I think the record should show it was a year, of which he was required to serve a split term of 90 days and the balance on probation. Is that not your understanding?

MR. FRIEBERT: That's my understanding.

Q You have completed your period of incarceration as ordered on February 14th?

A Yes, I have.

Q Now, prior to February 14, 1972, did you have any conversation with a Mr. Raebel?

A Yes, I have.

Q All right, what was the nature—when was your first contact with Mr. Raebel?

A The day that we set bail for me and Mr. Steinhoff.

Q And was that the day after you were arrested on the day of your arrest?

A The day after.

Q And what month was that?

A August I think, August 20th.

Q Well, you were arrested in August or October?

A On—October, October 20th.

Q Of what year?

A 1971.

Q Where did you first meet Mr. Raebel?

A Well, at the Federal Building that night.

Q That night of your arrest?

A Right.

Q And who were you with when you first met Mr. Raebel?

A I was with Barry Steinhoff.

Q And did you have conversation regarding your case at that time with Mr. Raebel?

A Yes, we did.

Q Would you relate that conversation?

A Well, he wanted to know where I got the drugs from, and he told me that I should cooperate and if I cooperated, you know, he would cooperate with me. And so I told him that I come in and made telephone calls to this number that I had from Oklahoma and—

Q This is that first conversation you are relating with Mr. Raebel?

A Right.

Q Did he make any reference of more to explain what he meant that he would cooperate?

A Well, he told me that he's handled hundreds of cases, and he said first possession you—just a minute—first possession you get—the first offense with possession of dangerous drugs would usually—gets probation, and he said that he asked for this Youth Corrections Act.

Q Did he explain what the Youth Corrections Act was?

A He told me that it was—after I was done with my probation, that the conviction is just wiped off the record.

Q Did he or did anybody ever tell you that under the Youth Corrections Act you could be subjected to approximately six years of combined probation and custody?

A No, no one ever told me that.

Q When was the first time you ever heard that?

A I heard it from you in a letter—a motion or whatever it was.

Q What else occurred during that first conversation?

A Well, I explained where I, you know, got the drugs from and—

Q Did you sign a statement?

A Yes, I did sign a statement.

Q Was there any discussion as to whether you should be charged with a felony or misdemeanor at that time?

A Yes, there was. He told me if I cooperated, he would give me a misdemeanor, charge me with a misdemeanor.

Q What was your understanding of what he meant by the word "cooperated" on your part?

A Well, I thought that I had to come in and get ahold of this guy from Oklahoma and tell him that I would send somebody out there to buy some drugs from him, and that was probably the main thing, and I had to just go to court. He said I'd go to court as soon as I got done with the telephone because I didn't complete—because I couldn't get in touch with the guy.

Q You were then released on bail; is that right?

A On my own recognizance, right.

Q Pardon?

A On my own recognizance.

Q And you continued to see Mr. Raebel after you were out on bail; is that right?

A Yes, it is. I saw him about 15 times.

Q Would you relate what you did during those meetings as best you can?

A Well, I usually met him at 5:30 at night.

Q Where?

A In Office of Dangerous Drugs.
Q In this office?
A In this building, right.
Q And what happened?
A And then we'd go in this back room and he'd bring out this little tapper for a telephone and I'd call this number up, and every time we called we could never get ahold of anybody. It was either no one was home or this guy I wanted to talk to wasn't home. So I kept on coming in and coming in like that, at 5:30 usually.
Q Was this at his request?
A Yes, it was.
Q And during those times when you came in, did you have conversations with respect to what would happen to you?
A Yes, we would have.
Q Would you relate those conversations during that period?
A Well, he really told me that there was really nothing to worry about, like when it came to jail, you know, he says, you know, you're helping us; and like I said, first possession case I figured I would be on probation. And I kept on like asking him this and he'd always just say nothing to worry about, nothing to worry about.
Q And did—was there any other further conversation regarding the Federal Youth Corrections Act?
A Yes, there was. He told me that I could qualify for it, and he wasn't sure so I asked him if I could check into it. He thought if—just if I had a felony against me. He checked into it; and like I came in two days later, whatever it was, he told me I could get it.
COURT: I didn't hear that. He told you what?
THE WITNESS: That I qualified for it with a misdemeanor, and he told me that he would try to come and get it, this Youth Corrections—

MR. FRIEBERT:

Q Did he say how he would try and help you get it?
A He said he would personally ask the Judge.
Q Now, did you ever—did you make all of your meetings promptly and when Mr. Raebel wanted you to be there?

A No, I missed one meeting.

Q What did—did that occasion any further conversation between you and Mr. Raebel regarding your future?

A Yes, it did. He told me that he didn't want to fool around with me and if I'd keep on missing a meeting—it was the only one I missed, though—he was going to issue a felony against me.

COURT: A what?

THE WITNESS: A felony.

MR. FRIEBERT:

Q Do you recall when that meeting was or when that conversation occurred?

A It was about—it was about the fourth time I was there, and that must have been three weeks after I was arrested probably then, around then.

Q Now, Mr. Dorszynski, as a result of these conversations, did you develop an impression as to what would happen to you in court?

A Yes, I did. I thought that I was going to get probation term, and I wasn't sure whether it was the Youth Corrections Act.

Q What were your thoughts as to—with respect to the Youth Corrections Act?

A Well, I thought there would be a good chance I could get it.

Q And what did you base that feeling on?

A On that when I came in, like I said, it was 15 times, whatever, and—

COURT: Will you read that answer.

(Whereupon the last answer was read.)

COURT: Have you completed your answer?

THE WITNESS: No, I haven't.

COURT: Go ahead.

THE WITNESS: Would you please read that again.

(Whereupon the last answer was read.)

THE WITNESS: And he gave me the impression like there was really nothing to worry about. There was something to worry—but when it came to jail—

MR. FRIEBERT:

Q Did the word "cooperation" and—include in your mind any action on your part with respect to how you would plead in court?

A Right. I thought cooperation meant all the way through, you know, just plead guilty. The plea was part of it, yes.

Q What do you think would have happened had you pled not guilty?

A Well, I'm not really sure. I don't know—might have been issued with a felony again. I don't know.

Q Did you feel that that would have an impact with respect to what a sentence would be?

A Yes, it would. Jail probably.

Q Now, Mr. Dorszynski, on February 14, 1972, certain questions were propounded to you by the Court. Do you recall that?

A Yes, I do.

Q And now, when the Court stated to you: "Has anybody exercised any pressure on you to plead guilty?" and your answer was: "No, sir," do you recall being asked that question and making that answer?

A Yes, I do.

Q Do you believe that that answer is in any way inconsistent with your testimony today?

A No, not really. It wasn't really pressure. It was like—like it—made it seem like there was nothing really —that there was no really big deal, you know, like—I don't know how to say this—like he didn't really pressure me to plead guilty, you know, it was part of the cooperation I figured that I plead guilty.

Q All right, then the Court asked you the following question: "Did anybody make any promises to you what would happen if you did not plead guilty?" And your answer was: "No, sir." Do you recall being asked that questions and giving that answer?

A Yes, I do.

Q Do you believe that that is inconsistent with what you have testified to here?

A No, I don't.

Q Would you explain that?

A Well, that's about the same thing, like nobody ever said that, nobody ever really came out and said anything either way. It was just—just the way people talked, you know, like we'll help you. No one ever said if you do this, we are going to get this for you. No one ever stated that. There was no really promises. It was more round-about thing-a-ma-jig.

Q Did you have—did you have any doubt as to what would happen to you, though, prior to your appearance in court?

A I thought I would be going home the same day. I thought I'd get probation.

Q And then, you were asked any question—strike that—"Any threats or promises?" And you said: "No, sir," and that was I think a continuation of the last question. Then the next question was: "Do you think arrangements have been made with the court as to what your penalty would be?" Your answer was: "No." Do you recall being asked that question and responding in that manner?

A Yes, I do.

Q Do you believe that is in any way inconsistent with the way you testified today?

A No, I don't think that there were any—that the Court had anything to do, you know, any—whatever—I don't know. I thought that it was just the way to do things. I thought if I cooperated, that would—that would have happened, you know, I would have got probation. I thought that was the way of doing things.

Q As a matter of course, that was the way?

A Right.

Q What did you base that opinion or feeling on?

A Well, a lot—just thought that was going to happen, like Mr. Raebel and my attorney, former attorney—

MR. FREIBERT: That's all.

## CROSS-EXAMINATION

BY MR. STADTMUELLER:

Q Mr. Dorszynski, you related earlier that Mr. Raebel indicated to you that he would contact the Judge

personally about your being placed on probation under the Federal Youth Corrections Act; is that right?

A That's what he told me that is what he would do.

Q When did this conversation take place?

A I'm not really sure of the date. Must have been about the 7th or 8th time I was in his office to make these telephone calls we naturally started talking, you know, to each other.

Q Yet your telephone calls weren't bringing any results, were they?

A No, they weren't.

Q And in spite of that, you say that this 7th or 8th time Mr. Raebel told you he'd contact the Judge about placing you under probation under the Youth Corrections Act; is that right?

A Yes, it is.

Q Did you ever ask Mr. Raebel if he ever in fact contacted the Judge or attempted to do so?

A No, I haven't seen him after that. When I saw him—couple times after that—but I haven't seen him after the Court—after February 14th.

Q Did he ever tell you what Judge he would contact?

A No, no. We weren't scheduled for any court. He wouldn't schedule me till after the phone calls were made or something was rescheduled.

Q When did you understand that this contact with the Court would be made?

A After I completed the telephone call.

Q Before any scheduled court appearance; is that right?

A Right.

Q So at the time you entered your plea you really had no idea whether anybody contacted the Court or not, is that right, that is Mr. Raebel?

A No, I didn't, no, no.

MR. STADTMUELLER: I have no further questions, Your Honor.

## REDIRECT EXAMINATION

BY MR. FRIEBERT:

Q Mr. Dorszynski, you stated in one of your answers on cross that something would be scheduled. Would you explain that answer? What do you mean by "something would be scheduled"?

A Well, the Court would reschedule it after I made telephone calls. That's what I meant. See, he told me as soon as I completed the telephone call, I could go to court, and not until after I completed them.

Q The time that the statement was made to you by Mr. Raebel, you had or made—strike that. After the statement was made to you by Mr. Raebel, you continued going to see him and making these phone calls; is that right?

A Yes, sir, I did.

MR. FRIEBERT: All right, that's all.

MR. STADTMUELLER: Nothing further, Your Honor.

COURT: So that when you were here in the courtroom for sentencing, you were under the impression that Mr. Raebel had arranged with me for your being put under the Youth Corrections Act; is that correct?

THE WITNESS: No, I thought that—well, he told me that he had to see the pre-sentence—the Probation Department, and I thought, see, I asked him, well, can you get this for me. He said I'll ask the Judge personally. I don't know that he asked or not.

COURT: You hoped he had?

THE WITNESS: I hoped this.

COURT: So that at the hearing I asked you the questions, "Do you think arrangements have been made with the Court as to what your penalty would be," and you answered that no?

THE WITNESS: I didn't think it was arrangement. He said he would ask if he—he wasn't going to arrange. He was going to ask. You know, sort of character witness, you know.

COURT: Any other questions?

MR. STADTMUELLER: I have none, Your Honor.

COURT: All right, you can step down, Mr. Dorszynski. Anything else from the Defendant?

MR. FRIEBERT: No, we have no further witnesses.

MR. STADTMUELLER: Your Honor, I'd like to call Mr. Raebel to clarify a few items. I believe he's out in the hall. I'll proceed to get him.

WILLIAM W. RAEBEL, having been first duly sworn on oath, testified as follows:

COURT CLERK: Would you please state your full name and spell your last name for the record?

THE WITNESS: William W. Raebel, R-a-e-b-e-l.

## DIRECT EXAMINATION

BY MR. STADTMUELLER:

Q Mr. Raebel, would you state again your full name, please?

A William W. Raebel.

Q And by whom are you employed, sir?

A U. S. Justice Department, Bureau of Narcotics and Dangerous Drugs.

Q In what capacity are you so employed?

A Presently the Acting Special Agent in charge of Milwaukee District Office.

Q Mr. Raebel, were you employed by the Federal Bureau of Narcotics and Dangerous Drugs on October 20, 1971?

A I was.

Q And directing your attention to that date, did you have occasion to come into contact with the Defendant in this matter, Douglas Raymond Dorszynski?

A I did.

Q Do you see him here in the courtroom today?

A Yes, I do.

Q And he is seated with his counsel?

A Yes, he is.

Q Mr. Raebel, would you relate to the Court what happened when you first came in contact with Mr. Dorszynski on October 20, 1971?

A It was on South Howell Aveue, I believe, in the 2300 block on—at Frosty's Grill. Other agents of the Milwaukee District Office arrested Mr. Dorszynski.

Q What happened to him after the arrest?

A He was brought in to the Milwaukee District Office here on the second floor of the Federal Building.

Q For what purposes was he brought in to the Milwaukee District Office?

A For processing, for fingerprinting, and photographing.

Q Did you have occasion to have a conversation with Mr. Dorszynski on the evening of October 20th at your offices here in the Federal Building?

A Yes, sir, I did.

Q Would you briefly outline the nature of that conversation?

A I gave him a form, which was a standard form for a Bureau, which was a waiver of rights. I gave him his rights, and I asked him if there was anything he wanted to say.

Q And what, if anything, happened after that?

A He told me the story behind the sale—or behind his arrest, and he gave a sworn statement.

Q After this statement was given, Mr. Raebel, what, if anything, did you tell Mr. Dorszynski at that time and place?

A I told him that all this cooperation would be brought to the attention of the U. S. Attorney.

Q Did you make any other statements to him at that time relative to this mater of cooperation?

A No, sir, I didn't.

Q Did you—did he give you any indication as to how he would cooperate?

A Well, he intended on placing a call to the source of supply. It was in Oklahoma City, and he would tell the source of supply that he was sending down somebody to to pick up a quantity of LSD for him.

Q And were attempts made by Mr. Dorszynski to place those phone calls?

A Yes, sir, they were.

Q How many occasions did that take place, or how many times did that take place?

A I'm not sure of the number. There must have been a dozen attempts to make that call.

Q Were any of them ever successful?

A No, he came in after one call and said that he had received several calls at his residence, and shortly after that time we were unable to get ahold of anybody in Oklahoma City.

Q When would Mr. Dorszynski come in to make these calls, Mr. Raebel, what time of the day?

A In the afternoon, late afternoon, between 4:30 and sometime 6 o'clock.

Q And how long would he stay at your offices in connection with placing these calls?

A Matter of ten, fifteen minutes at the most.

Q Now, you indicated that you had relayed to Mr. Dorszynski the fact that his cooperation would be called to the attention of the United State Attorney; is that correct?

A Yes, sir, I did.

Q Did you at any time in connection with your contacts with Mr. Dorszynski subsequent to his arrest on October 20, 1971, indicate to him that his cooperation would be called to the attention of any other body or agency?

A No, sir, I didn't.

Q During any of your contacts with Mr. Dorszynski, Mr. Raebel, did you have occasion to discuss with him the procedure of ramifications of what is commonly known as the Federal Youth Corrections Act?

A No, sir, I didn't.

Q Are you aware personally what the Federal Youth Corrections Act is?

A Basically.

Q Mr. Raebel, at any time during your contacts with Mr. Dorszynski subsequent to his arrest on October 20, 1971, did you have occasion to discuss with him calling to the attention of a Judge anything with respect to this case?

A No, sir, I didn't.

Q Mr. Raebel, did you at any time have any conversation with Mr. Dorszynski with respect to the alterna-

tive of his being charged with a misdemeanor as opposed to a felony?

A Yes, sir, I did.

Q What, if anything, did you state to him in that regard?

A I told him at the time he was arrested under the new law he could be charged either with a felony or with a misdemeanor.

Q And he was in fact charged with a misdemeanor; is that right?

A Yes, sir, he was.

Q Did at any time—strike that. Did you at any time explain to Mr. Dorszynski why he was charged with a misdemeanor rather than the felony?

A No, sir, I didn't.

MR. STADTMUELLER: I have no further questions of the witness.

## CROSS EXAMINATION

### BY MR. FRIEBERT:

Q Mr. Raebel, would you explain what your understanding is of the Federal Youth Corrections Act—you said you knew a little bit about it. What do you know about it?

A Well, I understand that there is a period of time when the Defendant is charged, he serves out his sentence, whatever his sentence may be, and at age 21—or now I'm not sure what age it is—in Wisconsin he could make a motion to the Court and have the charge taken off of his record.

Q Can the Federal Youth Corrections Act be used with a misdemeanor case, do you know?

A I have no idea.

Q Did you ever check on that in the course of your conversations or relationship with Mr. Dorszynski?

A No, sir, I didn't.

Q Now, you had, say twelve times at least or more that Mr. Dorszynski came in to make telephone calls?

A About twelve, about a dozen times I believe.

Q And during that time, did you have conversations with Mr. Dorszynski?

A I very seldom had a conversation with Mr. Dorszynski. The only time when I had a lengthy talk with him was the night of his arrest, and after that I was too busy. Another agent would handle it in the office.

Q Who was that?

A We had many agents whenever he came in.

Q Name one.

A Agent Streicher.

Q Any other agents?

A I don't know who handled him at the time.

Q But he would report to you, and you would give him to another agent?

A He would come in—

Q To make the phone call?

A He would come in, and he would ask for me, and I would give him to another agent to go in the back room and place the call, yes.

Q You would personally see him every time?

A Not every time, but I saw him quite often.

Q How, sir, do you know he was there a dozen times or more?

A Well, I only estimated a dozen times. I know he was in the office. They would tell me that he had been out there, that he was waiting at the front desk. On other occasions we would get a call from the guard on the west side of the building telling us he was there, and someone would go down and get him.

Q That's your impression, that it's a dozen or more?

A Yes.

Q And you did not—it's your testimony you did not see him on every occasion?

A No, sir, I did not.

Q Besides Agent Streicher who else assisted Mr. Dorszynski in this work?

A I don't know.

Q But you know of Mr. Streicher; is that right?

A Yes, sir, I do.

Q It's your testimony you had no conversations with Mr. Dorszynski after the first night of his arrest?

A No, sir, I didn't say that.

Q What kind of conversations would you have with him—strike that. Did you have any conversations with respect to what would happen to Mr. Dorszynski in this case?

A Not with Mr. Dorszynski, no, sir.

Q Did you have any conversations with his lawyer?

A Yes, I did.

Q What did you tell his lawyer about what would happen to him in this case?

A I didn't tell him anything about what would happen to him.

Q Did you—did Mr. Dorszynski appear to you to be in any way concerned about his future?

A Yes, he did.

Q How did he manifest that concern to you?

A He told me unless I released his car to him, that he would not be able to go to school, he could no longer come in and make his telephone calls and he was through.

Q What did you say?

A I told him the car was a defendant. It was being investigated. It would be either returned to him or forfeited to the Government.

Q What happened to the car ultimately?

A It was returned to the owner, the registered owner, which is his mother.

Q It was not forfeited; is that right?

A No, sir, it was not.

Q Did he seem concerned about what would happen to him with this case?

A He didn't express it to me.

Q Never expressed any concern to you about what would happen to him in this case?

A No, sir.

Q Is that your testimony?

A That's it.

Q On the first night, did you explain to him that this could be a misdemeanor or a felony?

A Yes, I did.

Q And did you explain to him that consideration would be given for misdemeanor if he cooperated?

A I told him that I would bring to the attention of the U. S. Attorney any cooperation.

Q Do you think—did you tell him that that cooperation could lead to a misdemeanor charge?

A No, sir, I did not.

Q Did you tell that to his lawyer?

A No, sir, I didn't see his lawyer at that time.

Q Did Mr. Dorszynski make every meeting when he was supposed to be there?

A No, sir, he did not.

Q How many did he miss? Do you know?

A I have no idea. There was a period of time when Mr. Dorszynski didn't come in at all.

Q Did you have any conversation with him with respect to his missing a meeting or meetings?

A No, sir, I did not.

Q Did you tell Mr. Dorszynski that if he didn't show up when he was supposed to, he would be charged with a felony?

A No, sir, I did not.

Q Did you tell Mr. Dorszynski that it's been your experience that first offenders—by the way, Mr. Dorszynski doesn't have a record; is that right?

A I'm not sure. I'd have to look that up.

Q Did you tell Mr. Dorszynski that at any time, or did anybody tell Mr. Dorszynski in your presence that it's been generally your experience that first offenders be charged with the misdemeanor and get probation?

A No, sir, I didn't say it, nor was it said in my presence.

Q Have you had any conversation with the United States Attorney or Assistant United States Attorneys with respect to the motions that have been brought in his case which we are hearing today?

A Yes, I did.

Q During part of that conversation did you ever discuss that if this plea were opened up, he would be charged with a felony?

A No, sir, there was no such statement made.

Q Was it discussed?

A No, sir.

MR. FRIEBERT: That's all.

MR. STADTMUELLER: I have no further questions, Your Honor.

COURT: Did you say anything to Mr. Dorszynski to the effect that he had nothing to worry about as far as going to jail is concerned if he cooperated?

THE WITNESS: No, sir, I did not.

COURT: Anything else of the witness?

MR. FRIEBERT: No.

MR. STADTMUELLER: Nothing, Your Honor.

COURT: Thank you. You're excused, Mr. Raebel.

(Witness excused.)

COURT: Anything else from the Government?

MR. STADTMUELLER: I have nothing to add, Your Honor.

COURT: Any rebuttal proof or any other testimony you want to offer, Mr. Friebert?

MR. FRIEBERT: No.

COURT: I take it then that both sides have submitted all the evidence that they want to submit as to any of the motions before—

MR. FRIEBERT: I presume the transcripts are a matter of record?

COURT: Yes, I have the transcript of the—of a sentence proceedings 14th of February, 1972. That's the one you had reference to?

MR. FRIEBERT: I believe there's another one, which —I believe the record of the bail hearing—which we don't have a transcript—I don't know if that's been filed.

COURT: I don't know that either. It's not of special moment, is it?

MR. FRIEBERT: I don't think so.

COURT: I have no objection with it being made a part of the file, but I'll leave the burden to you, Mr. Friebert, of physically causing it to be put in the file if you want.

MR. FRIEBERT: Fine. I just was inquiring. I don't thing it adds or has any impact on our discussion here.

COURT: Now, I'll be glad to entertain counsel's comments either on this motion or on the *McCarthy* Rule question that is implicit in one of the other motions, or any other matters that counsel wish to be heard on.

Mr. Friebert?

MR. FRIEBERT: Your Honor, I believe that guilty pleas are fraught with difficulties in the system. The problem with guilty pleas is that some people—and many people—believe, and I think wrongly, that there is something wrong with making deals within the system. I read many articles on it, as I am sure the Court has, and I have been involved in many debates. I personally put on the record every aspect of every understanding and deal that I am engaged in with respect to a guilty plea. I believe that many lawyers do not put these matters on the record.

I think Mr. Dorszynski was motivated by the innuendoes and unwritten word and knowledge of cooperation leading to consideration. It's inconceivable to me that—that since these events would go on and that a misdemeanor would be picked instead of a felony unless cooperation is indeed a feeling that a plea of guilty must follow.

I have advised my client that should we be successful in this motion, he should be aware that there is a possibility that he would be charged with a felony. I think that's the system. I think that that is something that any lawyer would have to advise his client. I think that Mr. Dorszynski understands this and understands that aspect of it all.

I think that there is truth in his testimony to the effect that things were said to him—that they weren't said in the quid pro quo, if you do this, this will happen; if you cooperate, I will do this. I think that conversations occurred. They're natural conversations, and they are conversations which law enforcement officers engage in all the time. I don't think there should be any secret about it. I think the problem is that questions are propounded by the Court which have slightly different context, and almost questions are in the context of a flat out promise.

But the man was put through the system, and I think his testimony is clear and believable, that he thought he would get probation and that he would have a very strong and good chance for Federal Youth Corrections.

One of the interesting sidelights at least on it is that Mr. Dorszynski said that he asked Mr. Raebel about the Federal Youth Corrections Act and Mr. Raebel—he said he didn't know if it could apply in a misdemeanor case. And Mr. Raebel said he knew something about the Act. What he didn't know about it was that he didn't know whether it would apply in a misdemeanor case.

But aside from that, Your Honor, I think that that stands behind every guilty plea, expectations versus as to when it crosses the line to a commitment in the mind of the Defendant. We are talking about the voluntariness of his plea. In this context and in this background, it is what goes on in his mind that's important, and not really the words that surround the development of his feeling on it.

He had a feeling that he would be given probation, and it's an understandable one in light of all of the surroundings of the case—misdemeanor as opposed to felony —all of his cooperation would be brought to the attention here by Mr. Raebel to the United States Attorney; and I think there are certain germs of truth, if not that Mr. Dorszynski understood by the language, that this would be brought to the attention of the Court.

Indeed at the very conclusion of the case, Mr. Dorszynski's counsel at that time and the Court engaged in a colloquy regarding whether the Court understood that there was cooperation, and the Court stated flatly that it did understand it. Obviously what everybody is saying is that this has to be considered. That's about all I want to say on that point.

On the *McCarthy* aspects of it, I believe that the transcript does not disclose compliance with the *McCarthy* v. *United States*. The Wisconsin Supreme Court in a recent advance sheet in *McAllister* v. *State*, at 54 Wis. 2d 224, overturned a guilty plea as not being in compliance with *McCarthy* and *Boykin* because there was no showing on the record that the Defendant understands the nature of

the crime with which he is charged. The Wisconsin Supreme Court has interpreted *McCarthy* to mean precise, on-the-record compliance. The record does not disclose the Defendant was specifically asked whether he understands that he waived his right against the self-incrimination by the entry of a plea, and I think that *McCarthy* means that that question specifically has to be asked of the Defendant, and that nothing can be left to an assumption or presumption that counsel told him all this or he understands all of this. He has to be told what his rights are, that he is waiving certain basic rights, and that's one of them specifically mentioned by *McCarthy*, and I think that that ought to be followed.

The standard practice of—book on jury instructions for the State of Wisconsin on the taking of guilty pleas states that that question ought to be requested. It's one of the questions that is written in State Practice to comply with *Boykin* and *McCarthy*.

Beyond that, the Defendant was not advised that he could be sentenced under the Federal Youth Corrections Act and as to what the impact of such a commitment might be. Mention of the Federal Youth Corrections Act is made in the record by Mr. Stadtmueller, in which he states very early—I believe at page 3—he said: "In addition, as one or both of these defendants may be under the age of 26, they may also be subject to the Federal Youth Corrections Act." There is no follow-up statement as to what a commitment under the Federal Youth Corrections Act means. He is asked whether he understands that he's subjecting himself to a penalty and that the penalty is a year, but the Federal Youth Corrections Act goes beyond that, even for a misdemeanor, so he wasn't advised as required by *McCarthy* as to what the potential penalties were as evidenced by this particular plea. And I think that that's a defect in the entry of the plea which *McCarthy* requires.

Finally, the Court did not make a finding this Defendant is under the age of 22, which means he was "mandatorily"—in quotes—that is the question that is before the Court—to be considered for commitment under the Federal Youth Corrections Act. The Act itself specifi-

cally states, as pointed out in the motion—supplemental motions to withdraw a plea of guilty—that the Court under Section 5010(d) must make a specific finding that the Defendant would not derive benefit from treatment under the Federal Youth Corrections Act. The Act itself is a—quite specific. The language could not be more specific. It says, and I'll quote it:

> "If the court shall find that the youth offender will not derive benefit from treatment under Subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision."

The word "shall" in the context of that statement is—appears to be mandatory, that before the Court can sentence the youth offender under the adult act, the Court must find and make a finding that the Defendant or young—youth offender will not derive benefit from treatment under the Youth Corrections Act.

I pointed out and I am sure the Court has read the two cases upon which I rely from the District of Columbia Court of Appeals, which interpret that provision as mandatory. This record does not have any findings by the Court whatsoever with respect to the fact that this Defendant would not derive benefit under the Federal Youth Corrections Act; and, therefore, the sentencing proceeding at least is not valid. It kind of intertwines with the plea in that he wasn't told he could be sentenced under that Act and the Court did not make a finding under the Act, and those two things really mesh with each other in a way that I think either if the Court makes a finding, for example, that under the motion to change the plea, that he should be sentenced under the Act, then perhaps the plea is invalid because he wasn't told that he could be sentenced under the Act and what that means. And it really kind of dovetails into each other in a way that compels I think a withdrawal of the plea, or in lieu of a commitment under the Act, a statement from the Defendant that he understands that in some way, to put this together so that the Defendant is—derives maximum benefit under the Act.

Now, the Federal Youth Corrections Act—I have a brief of the Government on a case that is up on appeal in the Fourth Circuit, which I believe has been filed with the Court, in case of *Cox* v. *United States.* A copy has been given to me.

Now, that brief is interesting in that there is a lot of very sketchy legislative history propounded by the Government. The problem with legislative history is that you can go to it if it's clear from the language of the statute as to what Congress said. It says if the Court shall find the youth offender will find benefit—it's a clear statement that the Court will make that finding. In that light, it seems to me that this Federal Youth Corrections Act is very similar to the Juvenile Act of the United States and as enunciated in *Kent* v. *United States.*

The major point I think of *Kent* is that you cannot assume reasons for waiver of a juvenile to the adult courts from a silent record. The reasons must be stated by the Court into the record so that there can be a meaningful hearing and a meaningful opportunity to respond and for meaningful review. It seem to be that that is the major holding of *Kent,* and that what applies equally to 5010(b).

I would object to an assuming that the Court made a finding, although I am sure that this Court did in its mind make such a finding; but the point is that the record is silent in that there is no statement as to why the Court rejected the Federal Youth Corrections Act and indeed whether the Federal Youth Corrections Act should be rejected.

Now, *Kent* has in its appendix certain factors which were used by the District of Columbia juvenile court to determine whether there should be a waiver of—and I'll just tick them off for the record. There are many things: seriousness of defense as a misdemeanor, violence and willfulness. There was no violence involved in this offense against persons or property. I am not sure how you define this particular charge, which is possession—the charge is possession of LSD, a misdemeanor and I guess if it's against anybody in the context of the charge, it's against himself. The merit of complaint, I assume

it has good merit. Associates—on whether they're youths or adults—in this case it was another youth. Maturity of the Defendant—I think he somehow demonstrates a lack of maturity. He doesn't act out as a 30 year old man might act out. He acts out more as a person of his age, a very young man. And, therefore, there should be certain degrees of mercy attended to it.

The record of the Defendant, he has none.

And the protection of the public and the prospects of rehabilitation. I think by the time this case came to court even today the public has been protected. He has done what he ought to with respect to cooperation, and he appears very likely to be rehabilitated.

So I think that the Federal Youth Corrections Act is an extension of the Youth Offender Act—or strike that —of the Juvenile Act and, therefore, all of the attendant procedural due process ought to be applied.

Since the record doesn't disclose this, I think that we ought to have an opening of his plea so that he can be afforded full procedural due process.

MR. STADTMUELLER: Your Honor, I only have a couple comments, and they relate to the withdrawal of the plea on the basis of the promises that apparently Mr. Dorszynski felt were made to him. I think the testimony that was elicited here this morning falls far short of what was set forth in the motion, namely that Mr. Dorszynski was told by Mr. Raebel of the Bureau of Narcotics he would receive probation under the Federal Youth Corrections Act. And I would share in Mr. Friebert's view that there is no question but when any defendant comes before this Court or any other, there is always the greatest expectation that this sentence will be light and that probation if the Court deems in its discretion to grant such probation.

In this case, if we look at some of the attending facts surrounding Mr. Dorszynski's dealings on the question of his receiving probation, he acknowledged very candidly here this morning he himself had no idea what the Federal Youth Corrections Act was all about until apparently Mr. Friebert called it to his attention.

I think when things of this type are considered, along with his not following up on the alleged comment by Mr. Raebel that he would contact the Judge with respect to probation under the Federal Youth Corrections Act, it tends to corroborate the fact that this Defendant had no more expectation of receiving probation or a light sentence than did any other Defendant. And I don't think the evidence here in any way can transcend or transcends the expectation of probation into a promise as is alleged in the various motions.

Concerning the other motions, Your Honor, I am going to rest on what we have previously submitted to the Court, and I don't want to belabor the points further. Thank you.

COURT: Do you want to respond, Mr. Friebert?

MR. FRIEBERT: I think that point made by counsel that the Defendant did not know what the Federal Youth Corrections Act was all about until I told him about is underscores the problem with the plea.

COURT: Do I understand from your position, Mr. Friebert, that there are really only two motions that you want the Court to resolve? There are other motions, but I think—I assume they are academic at this stage. Renewed motion for bail and—

MR. FRIEBERT: Yes.

COURT: Am I right in my assumption that you want the Court to rule on the *McCarthy* violation and also the 2255 application because of the alleged promises and inducements?

MR. FRIEBERT: Yes, and also challenge the Court did not make a finding—

COURT: Yes, that's part of the *McCarthy*, isn't it?

MR. FRIEBERT: I'm not sure whether that's not a separate ground.

COURT: All right. I'll be glad to address myself to both of them. I'll take a recess and consider the matter. The Court will reconvene when I'm through with the recess.

MR. FRIEBERT: Excuse me. There was another motion for reduction of sentence. I think they all intertwine.

COURT: Thank you.

(Whereupon a brief recess was taken.)

(Proceedings resumed at 11:20 o'clock, a.m.)

COURT: All right, the first matter I'll address myself to is the motion for reduction of sentence. That motion is denied.

Next, the Court will touch on the matter of failure of the Court affirmatively to make a finding that the Defendant, Mr. Dorszynski, did not qualify for the Youth Corrections Act. I believe that the—it is not mandatory that the Court speak to that issue. I am aware of the contrary stance taken in the District of Columbia Circuit. There is no such ruling by the Court of Appeals for the Seventh Circuit or for that matter any other circuit, and under those circumstances it's my belief that this Court should not treat the reference to the Youth Corrections Act as a mandatory requirement.

In the case of *Cox against America*—the *United States of America*, which is now on appeal in the Fourth Circuit as Case 71-1384, of which counsel are both aware—both counsel are aware—the Government's brief was submitted to the Court by the U. S. Attorney's Office in the instant Dorszynski case and I understand that's been given to Mr. Friebert also. Is that correct?

MR. FRIEBERT: Yes.

COURT: On page 26 of that brief, there is a citation from the Congressional Record in connection with the statute, and quoting Senator Kilgore as follows:

> "The judges say that the bill will give them an additional facility although use of the system provided by the bill will not be mandatory."

The Senator went on to say:

> "However. . . ."

This is all on page 26 of that brief:

> "However, when there is a case about which a judge is in doubt, if the accused is under the age of 22, the judge may refer the case to the Youth Correction Division."

Now, I appreciate that the Defendant's argument is that statutory language contemplates that the Court will affirmatively assert the application or absence of application of the Youth Corrections Act. And I recognize that that's been the ruling of the—in the District of Columbia Circuit.

However, I do not interpret the statute as mandatory for the reasons reflected in the *Cox* brief just referred to and further from the absence of any mandatory ruling by the Court of Appeals for this circuit. I decline to grant the Defendant's motion based on that contention.

Further, it seems to me that the Court impliedly holds the Youth Corrections Act not applicable and it does, as it did in the instant case, apply the standard sentencing authorizations. In committing Mr. Dorszynski for a one-year period, using a split sentence technique, I think the Court impliedly held that the Youth Corrections Act was not applicable.

The Defendant also urges that he should be permitted to withdraw his plea because under Rule 11 of *McCarthy* v. *United States*, 394 U.S., he was not advised that this entry of his plea would constitute a waiver of his compulsory self-incrimination. I find no merit to that argument. I find nothing in the decision of *McCarthy* v. *United States* which would justify the interpretation that Defendant's counsel has advanced.

I recognize that at page 466 there is a reference to the waiver against—to the privilege of self-incrimination —against self-incrimination, but I believe that the—there is a difference between that reference and the mandatory requirement that the judge mentions, the—that a plea of guilty constitutes a waiver of the privilege of self-incrimination.

Further, I invite attention to the question I put to Mr. Dorszynski appearing at page 4 of the transcript proceedings on February 14, 1972, where I said to him:

> "Q Now, you have a right to a trial, trial before a jury, a right to have your witnesses against you appear so you may be confronted by them. You are presumed innocent until and unless the Government is able to prove beyond a reasonable doubt

that you are guilty. If you enter a plea of guilty, you waive all that."

In my—that's the end of the quotation, and Mr.—that's the end of the question, and the answer was: "Yes, sir." In my judgment that constitutes an adequate compliance, indeed full compliance, with both Rule 11 and *McCarthy* v. *United States* and the directions that I have been able to ascertain from the Court of Appeals for this circuit.

The next question that the Court must consider is the Defendant's motion to be released from custody under a 2255 application, wherein he urges that his plea was induced by promises and coercion from Officer Raebel. I deny that application and that motion.

The testimony that's been adduced here this morning persuades me without the slightest hesitation to the conclusion that Mr. Dorszynski's contention as to promises and inducements and coercion is totally false. This is a man who's had his—is in his second year of college and must be deemed to understand the import of ordinary language. In the proceedings, the Court addressed two questions to him appearing on page 5 of the transcript, and I'll read them to you:

"Q Do you think arrangements have been made to the Court as to what your penalty would be?
A No.
Q So, subject to the maximum limitation, you understand you might get anything less than or as high as that but nothing more; is that correct?
A Yes, sir."

In my judgment, Mr. Dorszynski either misrepresented to the Court on those occasions or misrepresents here now his contention as to coercion.

On three specific points I am persuaded that Mr. Dorszynski lied in open Court this morning under oath. I think he testified falsely when he stated that he was told by Mr. Raebel that this being the first possession case, he could—that in a first possession case one usually gets

probation. I'm persuaded that Mr. Raebel did not say that or anything like it.

I'm also satisfied that Mr. Dorszynski testified falsely this morning when he stated that Mr. Raebel advised him that he didn't have to worry about jail.

And finally, I think Mr. Raebel testified falsely when he said—when he quoted Mr. Raebel as having stated that he, Mr. Raebel, would personally ask the Judge about his qualifications for the Youth Corrections.

(Discussion off the record.)

COURT: Mr. Dorszynski testified falsely saying that Mr. Raebel would personally bring to the Court or to the Judge's attention the matter of the Youth Corrections Act in relationship to Mr. Dorszynski.

Thus, I conclude that Mr. Dorszynski is not entitled to the relief he seeks, and I deny all his motions. I will ask the U. S. Attorney to submit an order for my attention—for my signature in that regard.

Now, the conclusion that Mr. Dorszynski has testified falsely provokes my concern for his right to remain on probation. I fully recognize that Mr. Dorszynski has the right to bring these proceedings in which he seeks to have his plea withdrawn, and under the law no more serious or harsh penalty can be imposed upon him because he seeks to do that and fails. Whether he succeeds or fails it would be immaterial. The fact is that a man should be free to do what Mr. Dorszynski has done.

*North Carolina against Pearce* is a good example of a man's—a defendant's protection in that regard. That is at 395 U.S. 711 at 723, but that does not apply in the instant case where the question is not one of a heavier sentence, but one of revocation of probation; and I believe and am thoroughly convinced that Mr. Dorszynski lied and lied outrageously to the Court under oath this morning. And I, therefore, believe that he should now be directed to show cause why his probation should not be terminated.

Mr. Friebert, do you want to address yourself to that matter?

MR. FRIEBERT: Yes, I am, frankly—I have to use the word outraged at the Court precluding a fact—unsuccessful 2255 application to threat—and now, the outright threat of snapping probation because of an unsuccessful attempt at it. I think *North Carolina* v. *Pearce* prohibits this.

If the Court says that Mr. Dorszynski was lying on the points, then he's desirous of a trial on it, but to snap probation because—the effect—the public policy effect of such a move I think would never to come into this court while he's on probation and challenge a plea because anybody who takes the stand runs the risk of such a ruling. That is too heavy a risk to impose on even the most meritorious of cases, because no one can predict how the trier of fact is going to view the testimony.

I could not in any conscience advise any client of mine on probation in this court to make any challenges during the period of probation. I think that such a move is—I—is outrageous. I don't see how this Court can say that this is not a penalty for bringing a 2255 petition.

His only recourse would be to make the assertion which he says happened but never take the stand, at the risk of blowing his probation.

What makes Mr. Raebel so honest? None of us were there. None of us were present at all at any of these proceedings. I'd like to advise the Court right now even that I was told by members of the United States Attorney's office that if we wanted—if we're successful, we could get a felony charge. I was told subsequent to that that they were kidding. The point where semantics and everything crosses from kidding to not kidding, from truth to fantasy, is a very strange line. People hear things the way they want to hear things. I heard that statement from members of the U. S. Attorney's office as a possible threat but proceeded anyways because I really didn't believe it myself that the United States Attorney would do that, as well as I thought that it would be illegal to do it, and that would be an interesting issue. But I told my client about that and warned him of that prospect.

I don't see how—first of all, I don't see how the Court can conclude that this man has perjured himself here. We have a burden of proof which obviously we did not sustain, but to cross the line of perjury is to, I think—I think to close our eyes to what happens in the world. Mr. Raebel is just as untruthful when he comes in here and says: "I have nothing to do with nothing." If the Court wants to believe that, I guess the Court has every right and power to believe that Mr. Raebel didn't do anything, that all of a sudden lo and behold here was this man coming in, dozen trips, for no reason. And no conversation, come in, how are you today, make the phone call, goodby. That to me belies the credibility of what happened in this Court, and I am really outraged because I don't think any lawyer in this district would be able to tell their client to come in and make any challenge, yes, sir, to plead, on a threat that if you lose and if the Court doesn't believe you, your probation goes. I think that violates all of due process.

If the government wants to bring a perjury charge, bring it; and we'll have a jury tell us whether Mr. Dorszynski committed perjury. That's a risk everybody takes, where the burdens of proof are beyond a reasonable doubt to a jury.

I am not prepared to proceed on such a matter, and I ask the Court fervently to reconsider its position and ask the Court how it, if it were a practicing lawyer before the bar of this Court, could in any good conscience, were the Court a practicing lawyer, advise any Defendant on probation to this court to challenge his plea. And it's obvious that any challenge of a plea is nothing but a swearing contest. I think that's the reason for *McCarthy*. I knew before today what Mr. Raebel would say. I've been through too many of these, and the Court has been through too many of these and has read transcripts. It always is that. One man says one thing and one man says another, and the Court always finds that the Defendant is lying and the man with the Government is telling the truth. That is always the conclusion in a one-on-one swearing contest, and then to compound that and say that he's to have his probation taken away

from him is to take this entire problem and say: "We'll never see it again because it will never be brought to court again." And that's my comments on the Court's position.

COURT: Do you want to be heard?

MR. STADTMUELLER: No, Your Honor, I have nothing to add.

COURT: I find no merit to Mr. Friebert's contention. It seems to me that this Court is not increasing Mr. Dorszynski's penalty. In the first sense, on the contrary, it's entirely within the punishment that was originally afforded Mr. Dorszynski. I will not debate with Mr. Friebert the correctness of my decision that Mr. Dorszynski has lied under oath this morning. The Court has reached its conclusion in that regard, and I must say with great concern and attention to the correctness or incorrectness of the testimony that I heard this morning. I am persuaded that Mr. Dorszynski, having committed those acts in my presence, should not be entitled to the benefits of probation; and, therefore, at the conclusion of this hearing on that subject, I now direct and enter an order vacating—terminating the probation of Douglas Dorszynski and commit him to the custody of the Marshal.

MR. FRIEBERT: Your Honor, before the Court finalizes that, may we have notice and time to prepare for such a hearing instead of a sua sponte order of the Court.

I would like to research and investigate whether the Court on its own statement as to what it concludes that facts to be can then determine that those are the facts and in effect be prosecutor and judge in the situation. I would like to research the fact as to my statements earlier as to whether this can be a proper basis of a revocation of probation. I would like to—there are many things that I would like to research. I would ask that certainly. I think the Federal Rules compel notice and an appropriate hearing. I haven't had any notice except five minutes ago. I don't think that's adequate time for me to prepare to represent Mr. Dorszynski in this.

COURT: I believe that since the matters that are referred to all occurred in open Court in the Court's presence, and since Mr. Dorszynski through his counsel

did have an ample opportunity to respond to the statement that the Court was contemplating revocation, I see no propriety in a—in any other formal proceedings. The application for further delay or hearing is denied.

MR. FRIEBERT: May we have a stay pending appeal?

COURT: Denied.

MR. FRIEBERT: May we have a reason?

COURT: A reason for what?

MR. FRIEBERT: For denial of a stay pending appeal.

COURT: Well, I think the—yes, I'd be happy to tell me—be pleased to tell you my reasoning. It is simply that I consider the conduct of the Defendant to justify forthwith termination of his probation. I think that's a discretionary matter with the Court. If it were—if it were something that the Probation Department resolved or considered in the absence of the Court, it would be something to which you would be entitled to notice and an opportunity to make a submission to the Court. But this is a matter that has occurred in the Court's presence and is the result of a—of a hearing in open Court, and I think any stays or delays are—are just simply unwarranted.

MR. FRIEBERT: Yes. One other point. May we have a stay on the imposition of sentence on the grounds that *United States* v. *Waters* and *United States* v. *Howard*, which are two Court of Appeals decisions out of the District of Columbia, and involving a question of first impression in this District, as to whether this Circuit and District—as to whether a sentencing proceeding can proceed on a youth without a—first making findings with respect to commitment and treatment under the Federal Youth Corrections Act are meritorious and entitled to an appeal and, therefore, entitled to a stay pending that disposition.

COURT: Denied. That application is denied.

MR. FRIEBERT: Is the matter meritorious, because I think Mr. Dorszynski will not be able to afford counsel for an appeal.

COURT: Well, I suggest that you assist him to the extent of having him apply to the Court of Appeals for appointment of counsel if you choose to take further proceedings, but that's something I cannot function on. I don't appoint counsel on appeal.

MR. FRIEBERT: I believe we would probably need a certificate of probable cause.

COURT: You can submit such a certificate, and I'd be inclined to grant—to sign it, but that wouldn't affect the matter of stay. I think the termination of probation is a purely discretionary matter with the Judge, with the Court, and there should be no delays in the imposition of that termination of probation where it's based on circumstances in open Court impropriety.

So far as the legal matter of affirmative recitation of the Youth Corrections Act, I recognize that there is an issue presented under the District of Columbia cases, and from that standpoint I certainly would honor, respect the Defendant's desire to appeal.

MR. FRIEBERT: Yes, but under Rule 38 in such a situation and the Bail Reform Act I think we would be entitled to bail pending an appeal because that appeal on that aspect attacks the underlying conviction. There is no reason to keep him in jail pending the appeal on the underlying conviction despite the revocation of probation, which is a separate issue.

COURT: Well, you know I have previously denied your application for bail pending the determination of these motions. You have then, as I understand it, sought that relief on an emergency basis from the Court of Appeals and it was denied to you. I think the same circumstances prevail. Do you have anything else, Mr. Friebert?

MR. FRIEBERT: Yes. Since the Defendant is probably indigent, I would ask the Court to advise the Defendant of his right to counsel and right to appeal.

COURT: We now stand adjourned.

## CONDITIONS OF PROBATION

(Formal parts omitted)

In accordance with authority conferred by the United States Probation Law, you have been placed on probation this date, February 14, 1972, for a period of two (2) years by the Hon. Myron L. Gordon, United States District Judge, sitting in and for this District Court at Milwaukee.

It is the order of the Court that you shall comply with the following conditions of probation:

(1) You shall refrain from violation of any law (federal, state, and local). You shall get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer.

(2) You shall associate only with law-abiding persons and maintain reasonable hours.

(3) You shall work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. When out of work you shall notify your probation officer at once. You shall consult him prior to job changes.

(4) You shall not leave the judicial district without permission of the probation officer.

(5) You shall notify your probation officer immediately of any change in your place of residence.

(6) You shall follow the probation officer's instructions and advice.

(7) You shall report to the probation officer as directed.

The special conditions ordered by the Court are as follows:

Defendant released from physical confinement May 11, 1972, probation commences. Probation terminates May 11, 1974.

I understand that the Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by

law, may issue a warrant and revoke probation for a violation occurring during the probation period.

I have read or had read to me the above conditions or probation. I fully understand them and I will abide by them.

## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT DATED JULY 20, 1973

(Formal Parts Omitted)

Before SWYGERT, *Chief Judge*, DUFFY, *Senior Circuit Judge*, and SPRECHER, *Circuit Judge*.

SWYGERT, *Chief Judge*. Petitioner-appellant, Douglas Raymond Dorszynski, appeals from orders of the district court revoking his probation and denying his motions for release from custody pursuant to 28 U.S.C. § 2255, to withdraw his plea of guilty, or alternatively for reduction of sentence.

The petitioner pleaded guilty on February 14, 1972 to unlawful possession of 1000 tablets of lysergic acid diethylamide (LSD) in violation of 21 U.S.C. § 844(a) and 18 U.S.C. § 2. He was sentenced to the custody of the Attorney General for a period of one year, 90 days of which were to be served in a jail-type institution. The execution of the remainder of the commitment was stayed and the petitioner was placed on probation for a period of two years following his jail sentence.

While serving his sentence, the petitioner filed a series of motions: (1) for release from custody pursuant to 28 U.S.C. § 2255, asserting that FED. R. CRIM. P. 11 was not observed because the petitioner was not advised that he was waiving his privilege against self-incrimination, that he was also not advised that he was subjecting himself to incarceration for a period of six years by entering a plea of guilty pursuant to the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026, and that the court made no finding that the defendant would not derive benefit from treatment pursuant to 18 U.S.C. § 5010(b) or (c); (2) to withdraw his plea of guilty pursuant to FED. R. CRIM. P. 32(d), asserting that his plea was coerced and was the product of promises and inducements made to him by Acting Special Agent William W. Raebel of the Dangerous Drugs and Narcotics Division to the effect that if he cooperated with the federal authorities and entered a plea of guilty, he would receive a sentence of probation pursuant to the provisions of the Federal

Youth Corrections Act; and (3) to reduce his sentence pursuant to FED. R. CRIM. P. 35. At the time of the hearing on the motions the petitioner had finished his jail sentence and was on probation.

Both Agent Raebel and the petitioner were witnesses at the hearing on the motions. The petitioner testified that Raebel had told him that he, Raebel, would ask the judge for probation of the petitioner under the Federal Youth Corrections Act.[1] Raebel denied this. The petitioner further testified that his testimony about Raebel's promise was not inconsistent with his sworn answers in response to the trial judge's questions at the time of the plea of guilty. At that time, he had answered that there were no promises, threats, or pressures to make him plead guilty and that he did not think arrangements had been made with the court as to what the penalty would be.

The trial judge indicated that he believed that the petitioner had testified falsely. He denied the motions and then requested counsel to show cause why the probation should not be terminated for lying under oath. After defense counsel argued against this action, the judge terminated the petitioner's probation and committed him to custody. This court ordered the release of the petitioner on bail pending appeal.

## I

The petitioner's first contention is that the trial judge did not observe Rule 11 of the Federal Rules of Criminal Procedure by not expressly advising the petitioner that by entering a plea of guilty he was waiving his fifth amendment right not to be compelled to testify against himself. According to the petitioner, *McCarthy* v. *United States*, 394 U.S. 459 (1969), and *Boykin* v. *Alabama*, 395 U.S. 238 (1969), require that a defendant be advised that, by pleading guilty, he is waiving his right against self-incrimination.

---

[1] If the petitioner had been placed on probation under the Federal Youth Corrections Act, he would have been eligible to have the record of his conviction expunged pursuant to 18 U.S.C. § 5021(b).

In the case before us the trial judge advised the petitioner that by pleading guilty he was waiving his rights to trial by jury and to confront the witnesses against him. The judge further advised the petitioner that he was presumed to be innocent and that the Government had the burden to prove that he was guilty beyond a reasonable doubt. The petitioner stated that he desired to waive those rights and the presumption. The judge also asked the petitioner if he had ample time to talk to his attorney and to understand what was happening. The petitioner said yes. The petitioner, a second year college student at the time of the plea and represented by counsel, has never alleged that he did not understand he was waiving his right against self-incrimination.

Neither *McCarthy* nor Rule 11 require a ritualistic question to a defendant asking if he understands that he is waiving his right against self-incrimination. The waiver is implicit. *United States* v. *Webb*, 433 F.2d 400, 403 (1st Cir. 1970).

II

The petitioner's second contention is that it was improper to commit him, a nineteen year old, as an adult unless the trial judge had first determined on the record that the petitioner would not benefit from treatment under the Federal Youth Corrections Act.[2]

The petitioner admits that the Youth Corrections Act was never mentioned in sentencing and that all parties assumed the petitioner was sentenced as an adult under the Criminal Code. He argues, however, that section 5010(d) of the Act requires the district judge to make a specific finding with reasons as to why the petitioner would not derive benefit from treatment pursuant to sec-

[2] The petitioner has also made an argument in his brief that he admits was not raised in the district court: That he could only have been placed on probation under the Federal Youth Corrections Act; and since he was placed on probation, he must have been sentenced under the Federal Youth Corrections Act and not as an adult. This argument has no merit since petitioner was not placed on probation but received a "split" sentence in accordance with 18 U.S.C. § 3651.

tion 5010(b) or (c). The authority for this position is *United States* v. *Waters*, 437 F.2d 722, 725 (D.C. Cir. 1970), which held that such a finding had to be explicitly or implicitly made.

The legislative history of the Youth Corrections Act establishes that a purpose of the Act was to make available a system for the sentencing and treating of youths to be used in the judge's discretion. *See* 1950 U.S. Code Cong. Service, p. 3983. It was designed to provide an alternative to sentencing as an adult under the Criminal Code.

The record here supports the implication that after the petitioner's trial counsel had raised the possibility of sentencing the petitioner as a youth offender, the trial court determined that the petitioner would not derive benefit from treatment pursuant to section 5010(b) or (c). Insofar as *Waters* requires that the trial judge make an explicit finding to that effect, we decline to follow it.

## III

Lastly, the petitioner contends that the revocation of his probation violated his rights to due process of law. At the conclusion of the post-conviction evidentiary hearing, the trial judge announced that Dorszynski testified falsely that agent Raebel had promised prior to sentencing to bring to the judge's attention the availability of the Youth Corrections Act. The judge followed up this announcement by saying, "And I, therefore, believe he [the petitioner] should show cause why his probation should not be terminated." At the conclusion of comments by petitioner's counsel, the court ordered the probation terminated.

The judge took the position that the petitioner had perjured himself in the presence of the court and that by terminating probation, he was not increasing petitioner's punishment but only reasserting the penalty originally imposed. The judge also inferred that under the circumstances no "formal proceedings" in conformity with FED. R. CRIM. P. 32(f) were required.

It is evident from the record that the judge determined that the petitioner was guilty of perjury, an offense punishable under 18 U.S.C. § 1621. Although the petitioner was not formally charged with that offense nor afforded a trial to determine his guilt, he was in a very practical sense convicted—in the mind of the judge—and punished by the revocation of his probation.

The only condition of the petitioner's probation prescribed at the time of sentence that is relevant was that he should "refrain from violation of any law [federal, state, and local]." Rule 32(f) provides that probation should be revoked only after a hearing "at which the defendant shall be present and apprised of the grounds on which such action is proposed." It is highly questionable whether the procedure by the rule was observed even in a rudimentary sense in the situation before us. But bypassing that and assuming that the petitioner did testify falsely, such conduct did not violate any of the specified conditions of his probation. Only upon being accused of and convicted of perjury in accordance with procedural due process would the petitioner have violated the condition of probation referred to above.

We appreciate the sense of outrage that the district judge apparently experienced upon becoming convinced that the petitioner had not testified truthfully. False swearing, however, not only is a serious offense, legally and morally, but also its proof must be established, if legal consequences are to result, by procedures that fully comport with due process. Although contempt was not alluded to in the instant proceedings, its analogy is readily apparent. *Ex parte Hudgings*, 249 U.S. 378 (1919), was a case where a witness was summarily punished for contempt after the trial judge had determined that the witness had testified falsely. In reversing the contempt decree, Chief Justice White wrote:

> It is true that there are decided cases which treat perjury, without any other element, as adequate to sustain a punishment for contempt. But the mistake is, we think, evident, since it either overlooks or misconceives the essential characteristic of the ob-

> structive tendency underlying the contempt power, or mistakenly attributes a necessarily inherent obstructive effect to false swearing. If the conception were true, it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purposes of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in a court would be gravely imperiled. 249 U.S. at 383-84.

Were probation terminable upon a judge's summary determination in a post-conviction proceeding that the probationer had testified falsely, the chilling effect of such a practice upon the pursuit of post-conviction remedies is quite apparent.

While we do not wish by our decision to give countenance to those who would take their sworn testimony in court lightly, for the reasons we have stated, we are constrained to reverse the order revoking the defendant's probation. The orders denying the other motions are affirmed.

Reversed in part; affirmed in part.

# SUPREME COURT OF THE UNITED STATES

No. 73-5284

DOUGLAS DORSZYNSKI, PETITIONER

*v.*

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 10, 1973

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MICHAEL RODAK, JR.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5284

DOUGLAS RAYMOND DORSZYNSKI,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## BRIEF FOR THE PETITIONER

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# TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | (iii-vi) |
| OPINION BELOW | 1 |
| JURISDICTION | 1-2 |
| CONSTITUTIONAL PROVISION INVOLVED | 2 |
| STATUTES INVOLVED | 2-4 |
| QUESTION PRESENTED FOR REVIEW | 5 |
| STATEMENT OF THE CASE | 5-8 |
| SUMMARY OF ARGUMENT | 8-9 |
| ARGUMENT | 9-25 |
| I. The Federal Youth Corrections Act Compels a Specific Finding by a Sentencing Court That the Youth Offender Would Not Benefit From Treatment Under the Act Before the Youth Offender Can Be Sentenced as an Adult | 9-10 |
| II. The Destruction of Valuable Rights on the Basis of a Silent Record Has Been Repeatedly Condemned by This Court | 10-15 |
| —The Federal Youth Corrections Act Creates Extremely Valuable Rights | 10-11 |
| —This Court Has Consistently Held That Due Process Requires Trial Courts To State Findings and Conclusions Before Valuable Rights Can Be Terminated | 11 |
| —A Statement of Reasons Is Required Before a Juvenile Can Be Prosecuted as an Adult | 11-12 |
| —A Statement of Reasons on the Record Is Necessary Before a Court Can Impose a Heavier Sentence Upon a Defendant Who Had Successfully Challenged His Original Conviction | 13 |

Page

–Valid Guilty Pleas Require Appropriate Records . . . . . 13-14

–Parole Cannot Be Revoked Without a Statment on the Reasons for Revoking Parole . . . . . 14

–A Defendant Cannot Be Committed as a Sex Offender Unless the Trial Court Makes Meaningful Findings . . . . . 14-15

III. Most Federal Courts Which Have Discussed This Issue Have Held, at a Minimum, That the Record Must Disclose the Reasons Why the Youth Offender Was Denied the Benefits of the Youth Corrections Act . . . . . 16-22

IV. The Specific Facts of This Case Demonstrate the Need for Requiring Sentencing Courts To Articulate Their Reasons for Refusing To Apply the Federal Youth Corrections Act and Supporting Their Reasons Wtih Appropriate Findings Demonstrating That a Youth Offender Would Not Benefit From Treatment Under the Act . . . . . 22-25

–When the Trial Court Commented Upon the Act in the Post-Conviction Hearing, the Court Misstated the Law When It Observed That the Act Was Not Applicable . . . . . 22-23

–The Arraignment in This Case Was in Error Because the Petitioner Was Not Advised About the Consequences of a Committment Under the Act. He Was Told That He Faced One Year in Prison When, in Fact, He Was Facing a Potential Six Years of Incarceration and Supervision Under the Act . . . . . 23-24

–The Trial Court Never Mentioned the Act at the Sentencing Proceeding . . . . . 24

Page

—When There is a Silent Record, There is no Way To Know Whether the Commands of Congress Have Been Met ..... 25

CONCLUSION ..... 25-26

## TABLE OF AUTHORITIES

*Cases:*

Carter v. United States, 306 F.2d 283 (D.C. Cir. 1962) ..... 23

Cox v. United States, 473 F.2d 334 (4th Cir. 1973) ..... 11, 20

Cunningham v. United States, 256 F.2d 467 (5th Cir. 1958) ..... 23

DeWitt v. United States, 383 F.2d 542 (5th Cir. 1967) ..... 17

Dorszynski v. United States, 484 F.2d 849 (7th Cir. 1973) ..... 1, 8, 21, 24

Kent v. United States, 383 U.S. 541 (1966) ..... 11, 12

McCarthy v. United States, 394 U.S. 459 (1969) ..... 13, 23

McCleary v. State, 49 Wis.2d 263, 182 N.W.2d 512 (1971) ..... 25

Morrissey v. Brewer, 408 U.S. 471 (1972) ..... 14, 15

North Carolina v. Pearce, 395 U.S. 711 (1969) ..... 13

Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963) ..... 23

Specht v. Patterson, 386 U.S. 605 (1967) ..... 14

Standley v. United States, 318 F.2d 700 (9th Cir. 1963) ..... 17

United States v. Butler, 481 F.2d 531 (D.C. Cir. 1973) ..... 19

United States v. Carmichael, 469 F.2d 937 (D.C. Cir. 1972) ..... 18

Page

United States v. Coefield, 476 F.2d 1152 (D.C. Cir. 1973) (en banc) ..... 18, 19, 23

United States v. Forrest, 482 F.2d 777 (D.C. Cir. 1973) ..... 19

United States v. Howard, 449 F.2d 1086 (D.C. Cir. 1971) ..... 17

United States v. Jarratt, 471 F.2d 226 (9th Cir. 1972) cert. den. 411 U.S. 969 (1973) ..... 20, 21

United States v. Kurzyna, 485 F.2d 517 (2nd Cir. 1973) ..... 21

United States v. Matthews, 480 F.2d 1191 (D.C. Cir. 1973) ..... 19

United States v. McDonald, 455 F.2d 1259 (1st Cir. 1972) ..... 20

United States v. McDonald, 481 F.2d 513 (D.C. Cir. 1973) ..... 16

United States v. Phillips, 479 F.2d 1200 (D.C. Cir. 1973) ..... 19

United States v. Reed & Hoston, 476 F.2d 1145 (D.C. Cir. 1973) (en banc) ..... 19

United States v. Riley, 481 F.2d 1127 (D.C. Cir. 1973) ..... 19

United States v. Schenker, 486 F.2d 318 (5th Cir. 1973) ..... 20

United States v. Thomas, 485 F.2d 1012 (D.C. Cir. 1973) ..... 19

United States v. Toy, 482 F.2d 741 (D.C. Cir. 1973) ..... 19

United States v. Ward, 454 F.2d 992 (D.C. Cir. 1971) ..... 18

United States v. Waters, 437 F.2d 722 (D.C. Cir. 1970) ..... 16, 17, 20

*United States Constitutional Provision:*

Fifth Amendment ..... 2

Page

*Statutes:*

18 U.S.C. §2 ..... 5
18 U.S.C. §3651 ..... 6
18 U.S.C. §4209 ..... 2, 16
18 U.S.C. §5006 ..... 3, 9, 21, 23
18 U.S.C. §5010 ..... *passim*
18 U.S.C. §5011 ..... 11
18 U.S.C. §5017 ..... 10
18 U.S.C. §5021 ..... 4, 11, 21
21 U.S.C. §844 ..... 5
26 U.S.C. §7237 ..... 20
28 U.S.C. §1254 ..... 2
28 U.S.C. §2255 ..... 7
22 D.C. Code §3202 (Supp. V, 1972), as amended by §205 of District of Columbia Court Reform Act, 85 Stat. 600 ..... 19

*Federal Rules of Criminal Procedure:*

Rule 11 ..... 13, 23
Rule 32 ..... 7
Rule 35 ..... 7

*Other Authorities:*

LaMar, Sentencing Under the Federal Youth Corrections Act: The Need for an Explicit Finding and a Statement of Reasons, 53 Boston U.L.R. 1071 (1973) ..... 17, 18
Standards Relating to Appellate Review of Sentences, approved draft, 1968, A.B.A. Project on Minimum Standards for Criminal Justice, §2.3(c) ..... 24, 25
Standards Relating to Sentencing Alternatives and Procedures, approved draft, 1968, A.B.A. Project on Minimum Standards for Criminal Justice, §5.6 ..... 24

Page

H.R. Rep. No. 2979, 81st Cong., 2d Sess., 2 U.S. Code Cong. & Ad. News 3983 ..... 10, 11

S. Rep. No. 2013, 85th Cong., 2d Sess., 2 U.S. Code Cong. & Ad. News, pp. 3891 (1958) ..... 17

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Page

H.R. Rep. No. 2979, 81st Cong., 2d Sess., 2 U.S. Code Cong. & Ad. News 3983 ..... 10, 11

S. Rep. No. 2013, 85th Cong., 2d Sess., 2 U.S. Code Cong. & Ad. News, pp. 3891 (1958) ..... 17

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## JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on July 20, 1973. An

application for certiorari was filed on August 16, 1973, and granted on December 10, 1973. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

ARTICLE V, Amendments to the United States Constitution.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATUTES INVOLVED

TITLE 18, United States Code

Sec. 4209, Young Adult Offenders

> In the case of a defendant who has attained his twenty-second birthday but has not attained his twenty-sixth birthday at the time of conviction, if, after taking into consideration as to delinquency or criminal experience, his social background, capabilities, mental and physical health, and such other factors as may be considered pertinent, the court finds that there is reasonable grounds to believe that the defendant will benefit from the treatment provided under the Federal Youth Corrections Act (18 U.S.C. Chap. 402) sentence may be imposed pursuant to the provisions of such Act.

Sec. 5006, Definitions

As used in this chapter–

(a) "Board" means the Board of Parole;

(b) "Division" means the Youth Correction Division of the Board of Parole;

(c) "Bureau" means the Bureau of Prisons;

(d) "Director" means the Director of the Bureau;

(e) "Youth offender" means a person under the age of twenty-two years at the time of conviction;

(f) "Committed youth offender" is one committed for treatment hereunder to the custody of the Attorney General pursuant to section 5010(b) and 5010(c) of this chapter;

(g) "Treatment" means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders;

(h) "Conviction" means the judgment on a verdict or finding of guilty, a plea of guilty, or a plea of nolo contendere.

Sec. 5010, Sentence

(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of

six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

Sec. 5021, Certificate Setting Aside Conviction

(a) Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the division shall issue to the youth offender a certificate to that effect.

(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its descretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

## QUESTION PRESENTED FOR REVIEW

Are sentencing courts compelled to state reasons on the record why a "youth offender" would not receive benefit from treatment under the Federal Youth Corrections Act before sentencing a "youth offender" as an adult.

## STATEMENT OF THE CASE

At the conclusion of an undercover investigation, the petitioner and another person were arrested on October 20, 1971 for trafficking in LSD. Ap. pp. 9-10. After the arrest, DOUGLAS DORSZYNSKI made repeated visits to the office of the Justice Department's Bureau of Narcotics and Dangerous Drugs for the purpose of calling the supplier of the LSD and attempting tc make arrangements to assist the Bureau in infiltrating that operation. DORSZYNSKI made between twelve and fifteen visits. However, his efforts were unsuccessful. Ap. pp. 22, 31.

On February 14, 1972, DORSZYNSKI and the other person appeared before the United States District Court for the Eastern District of Wisconsin, the Honorable MYRON L. GORDON, District Judge, presiding, for purposes of filing an information, arraignment, plea and sentencing. The government filed a one count information against these two defendants charging them with the misdemeanor of possession of LSD without a prescription, in violation of §844(a), Title 21, United States Code and §2, Title 18, United States Code. Both defendants were represented by the same attorney and both pled guilty to the charge. Ap. pp. 6-11. The defendants were advised that the maximum penalty was one year in prison or fine of up to $5,000 or both. Ap. p. 6. DOUGLAS DORSZYNSKI at the time of the arraign-

ment was nineteen (19) years old and therefore subject to commitment under the Federal Youth Corrections Act. The Assistant United States Attorney mentioned that the Federal Youth Corrections Act was a potential sentence, but there was no statement on the record regarding the potential six (6) years of incarceration under that Act. Ap. p. 6.

The court then made inquiries of MR. DORSZYNSKI. MR. DORSZYNSKI stated that he was in his second year of college, that he understood the charges as being possession of LSD and that he could be committed to one year in prison or fined $5,000 or both. The Court then advised MR. DORSZYNSKI that he had a right to a trial by jury, to have witnesses against him appear and be confronted by them and that he was presumed innocent until and unless the government was able to prove that he was guilty beyond a reasonable doubt. The court also asked DORSZYNSKI whether there had been any pressures exercised upon him, any promises or threats and whether there had been any arrangements with respect to his penalty. MR. DORSZYNSKI responded in the negative. The court accepted the plea of guilty and entered a judgment of conviction. Ap. p. 7-8.

The court then adjourned to read the presentence investigation report which had been completed prior to these proceedings. Upon reconvening, the petitioner was allowed his right of allocution and the court committed him to the custody of the Attorney General for a period of one year. The court then ordered DORSZYNSKI confined to a jail facility for ninety (90) days and stayed the execution of the remainder of the sentence by placing the petitioner on probation for two years. See 18 U.S.C. §3651 (2nd paragraph). The court at no point commented upon the Federal Youth Corrections Act. Ap. pp. 11-14.

Numerous post-conviction motions were filed by the petitioner on April 7, 1972 and April 27, 1972. On May 1, 1972, the petitioner filed a "Supplemental Motion to Withdraw a Plea of Guilty, for a Reduction of Sentence, and to be Released from Custody Pursuant to 28 U.S.C. §2255." This motion was brought pursuant to the Federal Rules of Criminal Procedure, Rules 32(d) and 35, as well as 28 U.S.C. §2255. The petitioner asserted in this supplemental motion that he should be released from this sentence because he was not advised that he was subjecting himself to a possible incarceration of six (6) years pursuant to the Federal Youth Corrections Act and further that he was entitled to relief because the court did not make any finding that he would not derive benefit from treatment under the Federal Youth Corrections Act in violation of 18 U.S.C. §5010(d). Ap. p. 18.

On June 2, 1972, an extensive hearing was held on all of these motions. At the conclusion, the court rejected the contention of the petitioner that the Federal Youth Corrections Act compelled a specific finding by the court that a youth offender would not receive benefit from such a commitment prior to imposing an adult sentence. The court stated:

> "Further, it seems to me that the Court impliedly holds the Youth Corrections Act not applicable and it does, as it did in the instant case, apply the standard sentencing authorizations. In committing Mr. Dorszynski for a one-year period, using split sentence technique, I think the Court impliedly held that the Youth Corrections Act was not applicable." (Ap. p. 45.)

The court then revoked the petitioner's probation, holding that the petitioner had testified falsely with respect to other aspects of the case. (Ap. pp. 47-52).

The judgment of conviction, the denial of the post-conviction motions and the revocation of probation were all appealed to the United States Court of Appeals for the Seventh Circuit. In a decision dated July 20, 1973, that court reversed the district court's order revoking probation. However, in Part II of that decision, the United States Court of Appeals for the Seventh Circuit rejected the contention of the petitioner with respect to the Federal Youth Corrections Act and held that a trial judge was not required to make a specific finding on the record that the "youth offender [would] not derive benefit from treatment." The Court of Appeals stated:

> "The record here supports the implication that after the petitioner's trial counsel had raised the possibility of sentencing the petitioner as a youth offender, the trial court determined that the petitioner would not derive benefit from treatment pursuant to Section 5010(b) or (c). Insofar as *Waters* [*United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970)] requires that the trial judge make an explicit finding to that effect, we decline to follow it." 484 F.2d at p. 851. (Ap. p. 58).

This Court granted a petition for a writ of certiorari to review the holdings which involve the Federal Youth Corrections Act.

## SUMMARY OF ARGUMENT

Congress created valuable rights when it enacted the Federal Youth Corrections Act. Youth offenders are eligible for specialized treatment and a setting aside of their convictions. The Act itself requires trial courts to "find that the youth offender will not derive benefit from treatment" under the Act before a trial court can impose an adult sentence. The United States Supreme

Court has consistently held that valid destruction of valuable rights will not be presumed from a silent record. Most courts of appeals have ordered trial courts to state their reasons for their decision to sentence a youth offender as an adult. Without a record, appellate courts can only resort to pure speculation when determining whether the benefits of the Act were properly denied.

## ARGUMENT

### I.

### THE FEDERAL YOUTH CORRECTIONS ACT COMPELS A SPECIFIC FINDING BY A SENTENCING COURT THAT THE YOUTH OFFENDER WOULD NOT BENEFIT FROM TREATMENT UNDER THE ACT BEFORE THE YOUTH OFFENDER CAN BE SENTENCED AS AN ADULT.

A youth offender is defined by the Federal Youth Corrections Act as "a person under the age of twenty-two years at the time of conviction." 18 U.S.C. §5006(e). After the conviction of a person under the age of twenty-two years, the sentencing court has a wide area of statutory discretion and duties. The court may suspend the imposition or execution of the sentence and place the youth offender on probation. 18 U.S.C. §5010(a). The court may commit the youth offender under the Act. 18 U.S.C. §5010(b). Such a commitment subjects the youth offender to incarceration and supervision for a maximum period of six (6) years. 18 U.S.C. §5017(c). If the offense carries a penalty of imprisonment in excess of six (6) years and the court finds that the youth offender would "not be able to derive maximum benefit from treatment by the division prior to the expiration of six years from the date of conviction," the court can sentence the youth offender under the Act for a period in

excess of six (6) years but no greater than the maximum penalty provided by the offense. 18 U.S.C. §5010(c), 5017(d). The sentencing court can commit the youth offender for a maximum period of sixty (60) days for purposes of obtaining "additional information as to whether a youth offender will derive benefit from treatment" under the Act. 18 U.S.C. §5010(e). The Act states the following with respect to sentencing the youth offender as an adult:

> "If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c) [18 U.S.C. §5010(b), (c)], then the court may sentence the youth offender under any other applicable penalty provision." 18 U.S.C. §5010(d).

There can be no doubt that the Federal Youth Corrections Act commands a finding by sentencing courts "that the youth offender will not derive benefit from treatment under" the Act as a prerequisite to sentencing the youth offender as an adult. The only issue involved in this case is whether that finding must be articulated on the record before imposing an adult sentence.

## II.

## THE DESTRUCTION OF VALUABLE RIGHTS ON THE BASIS OF A SILENT RECORD HAS BEEN REPEATEDLY CONDEMNED BY THIS COURT.

The Federal Youth Corrections Act was promulgated by a solicitous Congress interested in diverting such youth offenders from a life of crime. Its purpose is to avoid retribution with respect to youth offenders. The Act recognizes that, in many instances, immaturity breeds crime and that a youth offender may be deterred from a life of crime if he is treated in a manner which differs from the penalties exacted upon adults. See H.R.

Rep. No. 2979, 81st Cong., 2d Sess., 2 U.S. Code Cong. & Ad. News 3983, *et seq*. Thus, ideally, a committed youth offender is segregated from adult offenders and is provided with individualized treatment. See 18 U.S.C. §5011. In addition, youth offenders who are unconditionally discharged prior to the expiration of the maximum period of sentence or probation obtain an automatic setting aside of their convictions. 18 U.S.C. §5021. Thus, Congress has granted to youth offenders the opportunity to be "relieved from the future encumbrance of a prior criminal record." *Cox v. United States* 473 F.2d 334, 340 (f/n 4) (4th Cir. 1973). These Congressionally created rights are extremely valuable. Applying prior decisions of this Court, such valuable rights cannot be destroyed without due process of law as commanded by the Fifth Amendment to the United States Constitution. One of the requirements of due process of law which has been consistently found by this Court is that trial courts articulate their findings and their conclusions. This Court does not presume from silent records that valuable rights have been properly terminated.

In *Kent v. United States*, 383 U.S. 541 (1966), the United States Supreme Court established numerous due process requirements which must be met before a juvenile in the District of Columbia can be prosecuted as an adult. Among the requirements found by the Court were a formal hearing and a determination of facts by the trial court. In addition, the decision to treat a juvenile as an adult can be reviewed on appeal. This Court stated the following:

> "We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such

> tremendous consequences without ceremony—without hearing, without effective assistance of counsel, *without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner.*" (Emphasis supplied) 383 U.S. at p. 554 .

and

> "Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should neeessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of 'full investigation' has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review." 383 U.S. at p. 561.

The decision to sentence a youth offender as an adult is almost identical in its consequences to the decision to treat a juvenile as an adult. In both instances, the defendant is deprived of specialized treatment and relief from the burden of a criminal record. It appears to be inescapable that the holding of *Kent* requiring a statement of reasons is fully applicable to the Federal Youth Corrections Act.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Court was presented with the constitutional issues surrounding the practice of imposing a heavier sentence upon a defendant who had successfully challenged his original conviction and was subsequently reconvicted. The Court established very stringent guidelines upon sentencing courts as a precondition to the imposition of such a sentence. One of the requirements imposed by this Court was that the sentencing court must state its reasons in the record. It is obvious that this requirement implements the constitutional rights which were threatened due to the possibility of an increased penalty after a successful appeal. The Court stated:

> "In order to assure the absence of such a motivation [vindictiveness], we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceedings. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." 395 U.S. at p. 726.

Rule 11, Federal Rules of Criminal Procedure, compels a trial judge to determine that a guilty plea is voluntarily made and entered "with understanding of the nature of the charge and the consequences of the plea." The government in *McCarthy v. United States*, 394 U.S. 459 (1969) argued that the voluntariness of a plea could be determined by a subsequent factfinding hearing in the cases where the record is silent on the subject. This Court rejected that contention with the following statement:

"There is no adequate substitute for demonstrating *in the record at the time the plea is entered* the defendant's understanding of the nature of the charge against him." (Emphasis the Court's). 394 U.S. at p. 470.

This Court explored the due process requirements of a parole revocation in *Morrissey v. Brewer*, 408 U.S. 471 (1972). One of the due process requirements found by the Court was "a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." 408 U.S. at p. 489.

Prior to *Specht v. Patterson*, 386 U.S. 605 (1967), many states did not provide meaningful procedural rights to persons who were convicted of crimes and subsequently committed pursuant to a Sex Offenders Act. In *Specht*, the state of Colorado argued that the commitment under the Sex Offenders Act was nothing more than a sentencing alternative of a judge. When viewed in this light, Colorado urged that the due process requirements were identical to a regular sentencing proceeding. This Court rejected the Colorado position in *Specht*. The Court noted that a commitment under the Sex Offenders Act requires a new finding of fact which is not made when a person is found guilty of a criminal offense. "A distinct issue" is presented in a sex offender's sentencing proceeding. A multitude of rights which affects the future life of the defendant are resolved in such a proceeding. Under these circumstances, this Court held in *Specht* that:

"Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. *And there must be findings adequate to make meaningful any appeal that is allowed.*" (Emphasis supplied). 386 U.S. at p. 610.

This Court has been uniform in requiring a clear record when valuable rights are resolved in a court. Congress has legislated valuable rights to youth offenders. These rights should not be terminated without an appropriate hearing and without findings and conclusions on the record. Furthermore, since the Youth Corrections Act has as its core purpose the rehabilitation of youth offenders, the interests which are determined extend beyond the particular defendant. In this respect, a youth offender is in the same class as a parolee. This Court observed in *Morrissey v. Brewer, supra*:

> "This discretionary aspect of the revocation decision need not be reached unless there is first an appropriate determination that the individual has in fact breached the conditions of parole. The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law. Society thus has an interest in not having parole revoked because of erroneous information of the need to revoke parole, given the breach of parole conditions. (Citing a case) And society has a further interest in treating the parolee with basic fairness: Fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U.S. at pp. 483-484.

Society has an identical interest in restoring a youth offender to a "useful life within the law." Congress has resolved to accomplish this purpose by providing specialized and individualized treatment and by forgiving the transgressions of a youth offender. These Congressional rights should not be destroyed without a specific finding on the record, supported by reasons, "that the youth offender will not derive benefit from treatment under" the Act.

## III.

**MOST FEDERAL COURTS WHICH HAVE DISCUSSED THIS ISSUE HAVE HELD, AT A MINIMUM, THAT THE RECORD MUST DISCLOSE THE REASONS WHY THE YOUTH OFFENDER WAS DENIED THE BENEFITS OF THE YOUTH CORRECTIONS ACT.**

Most of the reported litigation on the Federal Youth Corrections Act is in the District of Columbia. The issue was first triggered by the decision in *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970). The nineteen year old defendant in *Waters* was sentenced as an adult with a recommendation by the sentencing judge that Waters "be placed in a youth institution." 437 F.2d at p. 725. The youth offender challenged his sentence and, while this challenge was pending, he was transferred to an adult institution. While there, Waters was beaten by an older prisoner and suffered permanent injuries. The Court of Appeals for the District of Columbia held that a sentencing court must make a finding of fact in each individual case that a youth offender would not benefit from treatment under the Act before imposing an adult sentence.

The court in *Waters* compared the Youth Corrections Act with the sentencing alternatives provided for "young adult offenders" in 18 U.S.C. §4209. 437 F.2d at pp. 723-724. A young adult offender is a person who has been convicted of a national crime and is between the ages of twenty-two and twenty-six at the time of his conviction. *United States v. McDonald*, 481 F.2d 513 (D.C. Cir. 1973). Such an offender may be sentenced under the Federal Youth Corrections Act if "the court finds that there is reasonable grounds to believe that the defendant will benefit from treatment provided under"

that Act. The court noted the legislative history with respect to young adult offenders. Congress' purpose was to allow treatment under the Youth Corrections Act for "exceptional cases" and "when the court makes a special finding that the defendant would benefit by the treatment methods prescribed by that Act." 437 F.2d at pp. 722-723, (f/n 7) quoting from S. Rep. No. 2013, 85th Cong., 2d Sess., 2 U.S. Code Cong. & Ad. News, pp. 3891, 3892 (1958). Thus, exceptional young adult offenders are committed as youth offenders and, conversely, only "exceptional" youth offenders are sentenced as adults. A sentencing court is required to make findings before committing a young adult as a youth offender. See *DeWitt v. United States*, 383 F.2d 542, 544 (5th Cir. 1967); *Standley v. United States*, 318 F.2d 700, 701 (9th Cir. 1963); and LaMar, *Sentencing Under the Federal Youth Corrections Act: The Need for an Explicit Finding and a Statement of Reasons*, 53 Boston U.L.R. 1071, 1079 (1973). Cf. *United States v. Wilson*, 450 F.2d 495, 498 (4th Cir. 1971) where the court ordered a new sentencing proceeding of a young adult when it appeared that the sentencing court may have erroneously imposed too harsh a sentence.

After *Waters*, the litigation in the District of Columbia concerned the extent of the findings which must be made by the sentencing court. In *United States v. Howard*, 449 F.2d 1086 (D.C. Cir. 1971), the court held that the Youth Corrections Act was applicable to a juvenile who was waived to the adult courts and convicted of murder. The court ordered a new sentencing proceeding and ordered the sentencing judge to consider the Federal Youth Corrections Act. This case demonstrates a strong policy reason for compelling a statement by a sentencing judge with respect to the Youth Corrections Act. Some sentencing judges may be confused regarding the scope

and application of the Act. If they are required to state their reasons on the record, any misunderstanding will be apparent and subject to correction. See LaMar, *Sentencing Under the Federal Youth Corrections Act: The Need for an Explicit Finding and a Statement of Reasons*, *supra*, 53 Boston U.L.R. at p. 1081.

The Court of Appeals for the District of Columbia reviewed numerous other refusals of sentencing courts to impose a sentence of a youth offender under the Act.[1] This series of cases culminated in *United States v. Coefield*, 476 F.2d 1152 (D.C. Cir. 1973) (*en banc*). The court held that a finding of "no benefit" would not be implied. Trial courts were directed to make an explicit finding of "no benefit" and accompany that finding with a statement of "reasons from which it can be determined that it is consistent with the purposes of the Act." 476 F.2d at pp. 1157-1158. Specifically, the court held as follows:

> "We do consider it essential, however, to assure in every case: firstly, that the District Judge manifest not only an awareness that the Act is applicable to the case, but also an accurate understanding of the scope of his discretion under the Act; secondly, that the District Judge has been informed of the pertinent facts relating to the individual defendant before him, either by evidence coming to his attention in the trial, by a presentence report, or by a recommendation and report made under section 5010(e); and thirdly, that the District Judge, by his

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[1] *United States v. Ward*, 454 F.2d 992 (D.C. Cir. 1971); *United States v. Carmichael*, 469 F.2d 937 (D.C. Cir. 1972).

statement of reasons where required, has given consideration and related the facts of the individual case to the applicable law." *United States v. Coefield, supra*, 476 F.2d 1152, 1157-1158.

See also *United States v. Reed & Hoston*, 476 F.2d 1145, 1150 (D.C. Cir. 1973) (*en banc*).

Subsequent to *Coefield*, numerous cases in the Court of Appeals for the District of Columbia have further interpreted the holding. In *United States v. Phillips*, 479 F.2d 1200 (D.C. Cir. 1973), the court held that a sentence under the Federal Youth Corrections Act could not be denied with a mere recitation of past unsuccessful rehabilitation efforts. The court required an analysis of the prior efforts and a statement on the reasons for failure. It is quite possible that there was failure in the past because the program provided was inadequate. See *United States v. Riley*, 481 F.2d 1127 (D.C. Cir. 1973). Generally, the Court of Appeals for the District of Columbia has ordered resentencing proceedings to comply with the commands of *Coefield*. See *United States v. Matthews*, 480 F.2d 1191 (D.C. Cir. 1973); *United States v. Toy*, 482 F.2d 741 (D.C. Cir. 1973); *United States v. Forrest*, 482 F.2d 777 (D.C. Cir. 1973). In one instance found by the petitioner, the Court of Appeals for the District of Columbia held that the record made by the trial court was adequate to support a finding "that the youth offender will not benefit from treatment under" the Act. *United States v. Butler*, 481 F.2d 531, 536-537 (D.C. Cir. 1973). Thus, in the District of Columbia, an entire body of law is being developed on the scope and meaning of the Federal Youth Corrections Act.[2]

[2] In the District of Columbia, persons convicted a second time for a crime of violence, while armed are not eligible for treatment under the Federal Youth Corrections Act. 22 D.C. Code §3202 (Supp. V, 1972), as amended by §205 of District of Columbia Court Reform Act, 85 Stat. 600. *United States v. Thomas*, 485 F.2d 1012 (D.C. Cir. 1973).

The United States Court of Appeals for the First Circuit in *United States v. McDonald*, 455 F.2d 1259 (1st Cir. 1972) held that a trial court erred when it ruled that a youth offender was not eligible for treatment under the Act because he was convicted of a drug offense governed by 26 U.S.C. §7237(d). Thus, the court ordered a remand to allow the trial court "to make the findings required by the Federal Youth Corrections Act." 455 F.2d at p. 1265. The court cited *Waters* with approval.

The United States Court of Appeals for the Fourth Circuit was presented with this issue in *Cox v. United States*, 473 F.2d 334 (4th Cir. 1973) (*en banc*). The trial court in *Cox* ruled that no finding of any kind whatsoever was required as a precondition to sentencing a youth offender as an adult. In remanding the case, the majority of the *en banc* court directed "the District Judge [to] explicitly find whether or not treatment under the Act would be beneficial to Cox." 473 F.2d at p. 337.

The United States Court of Appeals for the Fifth Circuit appears to have adopted the requirement for an explicit finding on the record that a "youth offender will not derive benefit from treatment under" the Act. In *United States v. Schenker*, 486 F.2d 318 (5th Cir. 1973), the government argued that the finding of "no benefit" is implicit because the trial court imposed an adult sentence. The Court of Appeals for the Fifth Circuit rejected that argument, vacated the sentence and ordered a resentencing proceeding "with appropriate findings under 18 U.S.C. §5010(d)."

The United States Court of Appeals for the Ninth Circuit in *United States v. Jarratt*, 471 F.2d 226 (9th Cir. 1972) *cert. den.* 411 U.S. 969 (1973) held that a youth

offender could be sentenced to probation as an adult.[3] The court held that the case had to be remanded due to a deficiency in the formal records. Even though the trial court stated explicitly that it did not intend to impose a sentence under the Act, the court made the following observation:

> "The court's stated intention to sentence him as an adult was an implicit finding that Jarratt would not derive benefit from treatment under paragraphs (b) or (c). Cf. United States v. Waters, 141 U.S. App. D.C. 289, 437 F.2d 722, 724 (1970). However, since we are remanding the case for resentencing for the reasons discussed *infra*, the district court should clarify its intention to place Jarratt on probation as an adult pursuant to paragraph (d) of §5010 by making an *express* finding that he will not derive

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[3] The United States Court of Appeals for the Second Circuit agreed with this holding of *Jarratt* in *United States v. Kurzyna*, 485 F.2d 517, 518-520 (2nd Cir. 1973). However, we disagree with these decisions. Such an interpretation is contrary to the plain meaning of 18 U.S.C. §5010(a) which states that a youth offender who does not need commitment can be placed on probation. Such a holding also destroys the plain meaning of 18 U.S.C. §5021(b) which states that a youth offender who is placed on probation obtains an automatic setting aside of his conviction upon early discharge. A "youth offender" is any person under the age of twenty-two. See Definitions at 18 U.S.C. §5006(e). He is a "youth offender" whether he is on probation, committed under the Act or committed as an adult. There is no recognition in the statutory scheme for labeling a person under the age of twenty-two as anything but a "youth offender." Thus, the provisions of 18 U.S.C. §5010(a) and 5021(b) are applicable to any "youth offender" who is placed on probation. This issue was brought to the attention of the United States Court of Appeals for the Seventh Circuit in this case and rejected by them at footnote 2 of the opinion. 484 F.2d at p. 851, Ap. p. 57.

benefit from treatment under paragraphs (b) or (c)." (Emphasis the court's). 471 F.2d at p. 230.

Thus it appears that most of the courts of appeal which have been presented with this issue have ordered trial courts to articulate their reasons on the record why a "youth offender will not derive benefit from treatment under" the Act. The Court of Appeals for the Seventh Circuit in this case erroneously declined to order the trial judge to state his reasons for sentencing DORSZYNSKI as an adult.

## IV.

## THE SPECIFIC FACTS OF THIS CASE DEMONSTRATE THE NEED FOR REQUIRING SENTENCING COURTS TO ARTICULATE THEIR REASONS FOR REFUSING TO APPLY THE FEDERAL YOUTH CORRECTIONS ACT AND SUPPORTING THEIR REASONS WITH APPROPRIATE FINDINGS DEMONSTRATING THAT A YOUTH OFFENDER WOULD NOT BENEFIT FROM TREATMENT UNDER THE ACT.

The only time the Federal Youth Corrections Act was mentioned by the trial court in this case was during the hearings conducted prusuant to the post-conviction motions. Ap. pp. 44-45. The court stated that, "in committing Mr. Dorszynski for a one-year period, using a split sentence technique, I think the Court impliedly held that the Youth Corrections Act was not *applicable*." (Emphasis supplied). Ap. p. 45. It is interesting to note that the precise language used by the sentencing court does not conform to the statutory language of 5010(d). The trial court stated that the Act was not applicable to the petitioner. That, on its face, is a misstatement of the law. The Federal Youth Corrections Act is applicable to all

persons convicted of a crime who are under the age of twenty-two.[4] 18 U.S.C. §5006(e). Under the Act, an adult sentence can only be meted out when the court makes a finding "that the youth offender will not derive benefit from treatment under" the Act.

At the arraignment in this case, the petitioner was advised that he faced "up to one year in prison and a fine of up to $5,000 or both." The petitioner was also advised that he might "be subject to the Federal Youth Corrections Act." Ap. p. 6. He was never advised that under that Act, he faced a period of incarceration and supervision of up to six (6) years. Thus, the arraignment violated Rule 11, Federal Rules of Criminal Procedure, and *McCarthy v. United States*, 394 U.S. 459 (1969). See *Pilkington v. United States*, 315 F.2d 204 (4th Cir. 1963).

Three disturbing conclusions can be drawn from this arraignment. First, one might assume that the prosecuting attorney, the defense attorney and the court made a mistake in failing to advise the petitioner about the application of the Federal Youth Corrections Act. See testimony of the petitioner where he related that the first time he knew the consequences of his plea was when he was so advised by counsel who represented him after his conviction. Ap. p. 22. Secondly, it might be assumed from this record that the parties did not know that the Federal Youth Corrections Act when applied to a misdemeanor offense increased the penalty to six (6) years.[5] Thirdly, it might be assumed that the court never

[4] As pointed out previously, the Court of Appeals for the District of Columbia stated in *United States v. Coefield*, 476 F.2d 1152 (D.C. Cir. 1973) (*en banc*), that the first item for the sentencing court to demonstrate is that the "Act is applicable to the case." See, text, *supra*, pp. 18-19.

[5] *Cunningham v. United States*, 256 F.2d 467 (5th Cir. 1958) and *Carter v. United States*, 306 F.2d 283 (D.C. Cir. 1962).

intended to impose a sentence under the Act. It is probably unfair to engage in such assumptions. However, when there is a silent record and a procedural error, appellate courts must resort to pure speculation to determine whether basic procedural and substantive rights have been provided to a defendant.

At the sentencing proceeding held after a recess, the petitioner's counsel asked at the conclusion of his statement to the court that the petitioner be placed "on probation under the Youth Corrections Act." Ap. p. 13. The trial court proceeded by pronouncing sentence. The court committed the petitioner to the custody of the Attorney General for a period of one (1) year, and then ordered that the petitioner be confined in a jail-type or treatment institution for ninety (90) days and, stayed the execution of the remainder of the sentence and placed the petitioner on probation for two (2) years. The trial court at no place mentioned the Federal Youth Corrections Act. The Court of Appeals interpreted this proceeding as supporting "the implication that . . . the petitioner would not derive benefit from treatment pursuant to Section 5010 (b) or (c)." 484 F.2d at p. 851. Ap. p. 58. The Court of Appeals could only assume that the inarticulated reasons for failing to apply the Act were appropriate ones.

The due process holdings previously enunciated by this Court and the clear language of the Act as interpreted by various courts of appeals demonstrate the error of the Court of Appeals for the Seventh Circuit. In addition, there is a clear trend in this country toward compelling sentencing courts to state their reasons for imposing a particular sentence. *Standards Relating to Sentencing Alternatives and Procedures*, approved draft, 1968, A.B.A. Project on Minimum Standards for Criminal Justice, §5.6 and *Standards Relating to Appellate Review*

*of Sentences*, approved draft, 1968, A.B.A. Project on Minimum Standards for Criminal Justice, §2.3(c). See also, *McCleary v. State*, 49 Wis.2d 263, 182 N.W.2d 512 (1971) for an extensive discussion of the A.B.A. Minimum Standards and its adoption by an appellate court. It is difficult to understand why a person who is charged with a misdemeanor, who cooperates with the Justice Department, and who is sentenced to probation is denied the benefits of the Act.

In this case, we must engage in pure speculation to determine why the petitioner was not properly advised regarding the potential period of incarceration involved in this prosecution; why the trial court did not believe that the petitioner would not benefit from treatment under the Act; whether the trial judge even considered the Federal Youth Corrections Act; and, whether the trial court in fact believed for some reason that the Act was not applicable rather than holding that the petitioner would not benefit from treatment under the Act. As pointed out previously, this Court has consistently held that there is no room in our system for a silent record when valuable rights are taken away from a citizen. It is totally inappropriate to assume from this silent record that the trial court validly denied the benefits of the Federal Youth Corrections Act to the petitioner.

## CONCLUSION

On the basis of the foregoing it is respectfully requested that this Court reverse the orders and judg-

ments of the Court of Appeals for the Seventh Circuit in this case, and, either order the imposition of a sentence of probation under the Federal Youth Corrections Act, or order the case remanded to the trial court for further proceedings.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 73-5284**

DOUGLAS RAYMOND DORSZYNSKI,
*Petitioner,*

—v.—

UNITED STATES OF AMERICA,
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## BRIEF FOR AMICI CURIAE

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### Interest of Amici Curiae

The National Legal Aid and Defender Association (hereinafter "NLADA") is a national, private, non-profit corporation devoted to the cause of equal justice under law for all. Its membership consists of the great majority of legal services programs, public defender offices, and coordinated assigned counsel systems throughout the United States. NLADA also has approximately 3,500 individual members, many of whom are practicing attorneys who represent poor people in criminal and civil matters. Many federal public defenders are also members of NLADA and provide direct representation to criminal defendants who can be sentenced under the Federal Youth Corrections Act (hereinafter

"F.Y.C.A."). The result in this case could have great significance in determining the role of the public defenders in the F.Y.C.A. sentencing process.

The National Prison Project of the American Civil Liberties Foundation, Inc., is a non-profit, tax-exempt New York corporation, engaged in efforts, through staff attorneys and other employees, to develop rehabilitative and other programs and facilities, devise model prison procedures and regulations, and otherwise to improve prison conditions in the United States. In furtherance of the activities described above, the Project's staff attorneys and other employees are engaged in the counseling and representation of prisoners incarcerated in penal institutions under defendant's control.

## ARGUMENT

The issue in this case is: Before a federal trial judge sentences a youth offender as an adult under the applicable provision of the federal criminal code, does § 5010(d) of the F.Y.C.A. require the judge to make an explicit finding, supported by reasons, that the youth offender will not derive benefit from treatment provided pursuant to the Act.[1]

Neither party to this case contends that § 5010 removes the judge's power to sentence a youth offender as an adult.

[1] The F.Y.C.A. is one of four specialized statutory schemes for the post-conviction disposition of federal offenders: juvenile offenders (those under the age of 18; 18 U.S.C. §§ 5031-37); youth offenders (those under the age of 22; 18 U.S.C. §§ 5005-26); young adult offenders (those between the age of 22 and 26; 18 U.S.C. § 4209); and adult offenders.

Section 5010 allows a judge to place a youth offender on probation (§ 5010(a)); to sentence him to a youth facility for a period less than six years (§ 5010(b)); to sentence him to a youth facility for more than six years but for not longer than the maximum applicable adult penalty (§ 5010(c)); or to sentence him as an adult. (§ 5010(d)).

or mandates that a youth offender be sentenced to an F.Y.C.A. facility. On the other hand, both parties acknowledge, as they must in the face of an explicit statutory command, that § 5010(d) limits the exercise of that power by requiring a finding "that the youth offender will not derive benefit" from treatment in an F.Y.C.A. facility before an adult sentence may be imposed. At issue in the present case, therefore, is the manner in which the judge's discretion under § 5010(d) is to be exercised, *i.e.*, the nature of the "no benefit" finding. More precisely, must the sentencing judge make that finding explicit and must he provide supporting reasons?

It bears emphasis that the issue presented is a *procedural* one: Must the "no benefit" finding be explicit and supported by reasons? Since the Court of Appeals for the Seventh Circuit held that an explicit finding of "no benefit" was not required when sentencing a youth offender as an adult and since the District Court gave no reasons, this Court does not have before it the *substantive* question of what are *sufficient* reasons under the Act for declining to sentence a youth offender to F.Y.C.A. facilities. As we show in Section III of this Brief, none of the broader questions urged on this Court for decision by respondent is properly presented.

## I.

**Proper Construction of the F.Y.C.A. Requires That a Sentencing Judge Make an Explicit Finding, Supported by Reasons, That a Youth Offender Will Not Derive Benefit From Treatment Provided Pursuant to the Act Before Sentencing the Youth as an Adult.**

The language and history of the F.Y.C.A. demonstrate that Congress made special findings with respect to youth offenders, established special goals for sentencing them, and devised a special correctional system for their rehabilitation. The language of § 5010(d), especially when read in light of this history, compels the conclusion that an explicit finding, supported by reasons, is required before a youth offender may be sentenced as an adult.

### A. *The Language of § 5010(d) Shows That an Explicit Finding, Supported by Reasons, Is Required Under the Act*

Section 5010(d) provides:

> "*If the court shall find that the youth offender will not derive benefit from treatment* under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision." (emphasis supplied)

There is a compelling inference from this language that Congress intended that an explicit conclusion of "no benefit", supported by reasons, should be articulated before sentencing a youth offender as an adult. The word "shall" indicates that the finding is mandatory. And the conclusion which a judge must reach before he may impose an adult sentence—that the youth offender *will not derive benefit* under the F.Y.C.A.—is stated in uncompromising terms, indicating, on the face of the statute, Congress' clear prefer-

ence for committing youth offenders to F.Y.C.A. facilities rather than sentencing them to adult correctional institutions.[2]

Given the importance of the § 5010(d) finding manifested on the face of the statute, a requirement that it be stated explicitly and be supported by reasons clearly follows. Such a requirement would ensure that the critical finding is based on individualized consideration of the offender and is consistent with the statutory goals.[3]

### B. *The Legislative History of the F.Y.C.A. Also Demonstrates That an Explicit Finding, Supported by Reasons, Is Required Under the Act*

The F.Y.C.A. was intended to provide a new, comprehensive sentencing and treatment system for youth of-

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[2] Congress could have said, but did not, that before sentencing a youth offender to an F.Y.C.A. facility, the judge must affirmatively find that the youth would benefit from F.Y.C.A. treatment. This is what Congress did in 18 U.S.C. § 4209, covering young adult offenders (persons 22 to 26). That provision states:

> "... *if ... the court finds that there is reasonable grounds to believe that the defendant will benefit from the treatment* provided under the Federal Youth Corrections Act ... sentence may be imposed pursuant to the provisions of such act." (emphasis supplied)

[3] Section 5010(e), which can be utilized by a judge making a § 5010(d) finding, provides:

> "If the court desires additional information as to whether a youth offender *will derive benefit* from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court *its findings.*" (emphasis supplied).

Two courts of appeals have held that the sentencing judge may place the findings of the Division on the record and incorporate them as his own, without necessarily having to state further reasons. *United States* v. *Coefield*, 476 F.2d 1152 (D.C. Cir. 1973) (*en banc*); *United States* v. *Kaylor*, No. 73-1530, (2nd Cir., February 11, 1974) (*en banc*) (slip opinion).

fenders. S.Rep. No. 1180, 81st Cong., 1st Sess. 1 (1949) (hereinafter "1949 S.Rep."). From the legislative history, certain goals and principles emerge as the salient considerations which animated Congress.

### 1. The Basic Goal of the F.Y.C.A. Is to Rehabilitate the Individual Youth Offender So as to Avoid His Transformation Into a Habitual Criminal

Congress was concerned that "special causations which occur in the period between adolescence and manhood are, in large measure, responsible for antisocial conduct trends manifested by persons [under 22]." H.Rep. No. 2979, 81st Cong., 2nd Sess. 2 (1950) (hereinafter "1950 H.Rep."). The group of offenders in that age group is "the focal source of crime. It is during that period that habitual criminals are spawned." 1949 S.Rep. 1. And Congress found that "most of the causes which contribute to antisocial conduct of youth offenders . . . disappear when the youth reaches full maturity." 1950 H.Rep. 3.

Congress clearly hoped to make a "substantial contribution" towards solution of the crime problem by substituting "correctional rehabilitation for retributive punishment" for youth offenders. *Id.*, at 1.[4] Accordingly, to reach the youth

[4] "The underlying theory of the act is to substitute for retributive punishment, methods of training and treatment designed to correct and prevent criminal tendencies. The plan of the act departs from the merely punitive idea of dealing with youthful offenders and looks primarily to the objective idea of rehabilitation." Report to the Judicial Conference of the Committee on Punishment for Crime, Report of the Subcommittee on Treatment of Youthful Offenders 35 (1942). The Judicial Conference, in the 1942 report, published a "Draft Act to Provide A Correctional System for Youth Offenders." The statement above refers to that Draft Act. Hearings on the Act were held in Congress during 1943. And the Draft Act was the core of the F.Y.C.A. when it was passed in 1950. 1949 S. Rep. 3-4; 1950 H. Rep. 8. See also *Hearings on S.1114 and S.2609 Before a Subcomm. of the Senate Comm. on the Judiciary*, "A Correctional System for Youth Offenders," 81st Cong., 1st Sess. 60 (1949) (hereinafter "1949 Senate Hearings").

offender "before the traits of the habitual criminal are allowed to develop," Congress created a special system of "analysis, treatment and release that will cure rather than accentuate the antisocial tendencies that have led to the commission of crime." *Id.*, at 1. This system was to meet the need created by "the existing methods of treatment of criminally inclined youths" which are "not solving the problem." *Id.* As the D.C. Circuit has stated, "the patent purpose . . . exhibited" by Congress was "to do everything possible to save youthful offenders from lives of hopeless criminality." *United States* v. *Reed & Hoston,* 476 F.2d 1145, 1149 (D.C. Cir. 1973) (*en banc*).

**2. The Concept of Rehabilitative Treatment Was Broadly Conceived by Congress, and a Comprehensive System for Rehabilitation Was to Be Provided**

The broad conception of treatment which Congress intended youth offenders to be given is evident on the face of the statute. Section 5006 defines "treatment" expansively as "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders." Section 5011, the "treatment" provision, states:

> "Committed youth offenders not conditionally released shall undergo treatment in institutions of maximum security, medium security or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the *essential varieties* of treatment." (emphasis supplied).

And the emphasis on providing appropriate treatment for each individual offender is reflected in § 5014, which states:

> "The classification center or agency shall make a complete study of each committed youth offender, including a mental and physical examination, to ascertain his personal traits, his capabilities, pertinent circumstances of his school, family life, any previous delinquency or criminal experience, and any mental or physical defect or other factor contributing to his delinquency. . . . The agency shall promptly forward to the Director . . . a report of its findings with respect to the youth offender and its recommendations as to his treatment."

The legislative history demonstrates that the F.Y.C.A. was closely patterned after the English Borstal System used to treat youth offenders. 1950 H.Rep. 3. According to the Judicial Conference report accompanying model legislation from which the F.Y.C.A. was largely derived, the Borstal System provided a "method of closely integrated, highly individualized institutional rehabilitation and aftercare of convicted" youth offenders. Report to the Judicial Conference of the Committee on Punishment for Crime, Appendix I: The Borstal System 53 (1942). As the 1950 House Report noted, "[t]hree cardinal principles dominate the [Borstal] System: (1) flexibility, (2) individualization, and (3) emphasis on the intangibles." These principles were implemented by carefully diagnosing the offending individual and by systematically providing a broad range of treatment institutions to meet the particular needs of a youth offender. 1950 H.Rep. 4.

Thus, Congress' intention to provide broad and comprehensive rehabilitative treatment through the F.Y.C.A. is unmistakable. Minimum to maximum security institutions are to be available. 18 U.S.C. § 5011. Long and short-term treatment are to be provided. 18 U.S.C. §§ 5010(b-c). The F.Y.C.A. facilities are to provide a wide range of treatment services. 18 U.S.C. § 5011; 1950 H.Rep. 5. And these facilities are to meet a broad range of individual youth offender

needs—physical, psychological, educational, vocational, and recreational—in the name of the ultimate goal, rehabilitation.[5] As Dr. William D. Lewis, then director of the American Law Institute, said in the 1943 House hearings on the legislation, "the provisions . . . [of the bill] integrate all the various steps in handling the youth offender and thus make possible real individual treatment."[6]

### 3. Segregation of Youth Offenders From Adult Criminals Is Also an Important Congressional Goal of the F.Y.C.A.

In creating a wholly separate sentencing and treatment system under the F.Y.C.A., Congress intended to prevent recidivism not only through special treatment of youth offenders but also through segregation of youth offenders from adult criminals. Congress found that adult prisons had direct, harmful effects on youths incarcerated there:

> "By herding youth with maturity, the novice with the sophisticate, the impressionable with the hardened,

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[5] The 1949 Senate Report, at 4, describes the Borstal System in this respect:

> "The Borstal program features . . . an individual plan based on close acquaintance with individual needs; a high degree of personal interest on the part of the staff; reliance for rehabilitation upon the analysis of the physical, physiological and social needs of persons in this age group, and allocation to the facility best suited to fill that need."

*See also* 1949 Senate Hearings, at 11, 24, 27, 30-31, 44, 46, 75.

[6] *Hearings Before a Subcomm. of the Comm. of the Judiciary of the United States House of Representatives on H.R. 2140, "Federal Corrections Act and Improvement in Parole,"* 78th Cong., 1st Sess. 47 (May 18-19, June 10, 1943). (Hereinafter "1943 House Hearings.") The American Law Institute, like the Judicial Conference, had drafted a model youth act based on the Borstal System. American Law Institute, Youth Correction Authority Act (1940). See 1950 H. Rep. 8. See also 1949 Senate Hearings, at 75-6 (statement of John Ellingston, American Law Institute).

> and by subjecting youth offenders to the evil influences of older criminals and their teaching of criminal techniques, without the inhibitions that come from normal contacts and counteracting prophylaxis, many of our penal institutions actively spread the infection of crime and foster, rather than check it." 1950 H.Rep. 2-3.[7]

Accordingly, the statute, in terms, provides for segregation of youths from adults, and of more hardened youths from the less criminally sophisticated: " . . . youth offenders shall be segregated from other offenders, and classes of committed youth offenders shall be segregated according to their needs for treatment." 18 U.S.C. § 5011.

#### 4. A Strong Presumption Favors Commitment of Youth Offenders to Youth Act Facilities Rather Than Adult Institutions

The 1949 Senate Report underscores the point that there is a presumption favoring commitment under the F.Y.C.A. over adult sentencing:

> "If after the [§ 5010(e)] report is received from the classification center . . . the judge is convinced that the youth is incorrigible and would derive *no help* from the program, he may sentence him under any applicable provision of law." *Id.*, at 5 (emphasis supplied).

As Senator Kilgore, the Senate sponsor of the Act, remarked during the 1943 hearings, given "the tools to work with these youthful offenders themselves [as the F.Y.C.A. would provide], there is only about 10 percent of them that you will eventually have to sentence [as adults], *or less.*" *Hearings Before a Subcomm. of the Comm. on the Judiciary*

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[7] See also 1949 Senate Hearings, at 48, 60.

*of the United States Senate on S.895, 78th Cong., 1st Sess.* 13 (1943) (emphasis supplied).[8]

Another example of Congress' desire to afford F.Y.C.A. treatment to the maximum number of youth offenders is its addition of § 5010(c) to the 1943 version of the legislation. This provision extended the scope of the Act to youth offenders of even more doubtful rehabilitative possibilities; it provided that those youths who might not have qualified for treatment under § 5010(b), because of the inadequacy of the six-year limitation in that provision, could nevertheless be sentenced *under the Act* for a period up to the maximum authorized for the offense.

Finally, the presumption favoring commitment under the F.Y.C.A. over adult sentencing follows clearly from the Congressional finding that youth offenders are a special class, from the establishment of the special goals for that class of rehabilitation and segregation from adult offenders, and from the comprehensive treatment system Congress provided.[9]

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[8] Another indication that Congress intended that only a very small percentage of youth offenders would receive an adult sentence is found in the testimony of American Law Institute Director Lewis during the 1943 House Hearings. *See* note 6, *supra*, and text accompanying it. Lewis was commenting that only a small percentage of youth offenders would need maximum security facilities *under the Act itself*, and he defined those in need of such facilities as "the dangerously anti-social, those whose criminality has become a deep-seated habit." If youth offenders such as those were to receive F.Y.C.A. disposition, only the most extreme cases would not be eligible for an F.Y.C.A. commitment.

The 1950 House Report concludes, at 10:

> "The problem of that unfortunate part of our young men who fall into anti-social tendencies presents an inspiring challenge and it can be solved. Instead of 70 percent of our youth offenders developing into hardened criminals, more than 70 percent can be rehabilitated and made useful members of society."

[9] This comprehensiveness was described most succinctly by Circuit Judge Orie L. Phillips:

*(footnote continued on next page)*

### 5. The Presumption in Favor of Committing a Youth Offender to a Youth Act Facility Can Only Be Rebutted by a Finding That He is Incorrigible

To find that a youth offender is ineligible for commitment to an F.Y.C.A. facility—to satisfy the "no benefit" requirement of § 5010(d)—a showing must be made that the individual is incorrigible. This follows from the primary Congressional goal of treatment of youth offenders before they develop the traits of the habitual criminal. If a person has already developed the traits of the habitual criminal—is an incorrigible recidivist—special youth treatment and special segregation from adult criminals will be of no avail. As Harrison Tweed, President of the American Law Institute, stated:

> "... if the criminal law is to do a more effective job of protection, it must seek to rehabilitate all those who can be rehabilitated and segregate indefinitely those who remain incorrigibly dangerous. This new purpose, I believe, will be accomplished through the instrumentality of the proposed legislation." 1949 Senate Hearings, at 37; see also *id.*, at 40 (statement of Sen. Kilgore).

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"The most important features of the ... [Act] are integration of correctional measures under a single body, segregation of youth offenders from adult offenders and segregation of classes of youth offenders, power to develop a variety of treatment facilities, flexibility of operations in adapting particular forms of treatment to individual youths in accordance with their favorable or unfavorable responses, adequate supervision during conditional release and focusing of effort on the important youth crime problem." 1943 House Hearings, at 33.

Judge Phillips was Chairman of the Subcommittee on Treatment of Youth Offenders of the Judicial Conference's Committee on the Punishment of Crime. He was thus instrumental in drafting the model act upon which the F.Y.C.A. was based.

*See also United States* v. *Coefield, supra,* 476 F.2d at 1156 ("No federal statute having to do with sentencing compares in comprehensiveness with the Youth Corrections Act.").

This view was echoed in the 1949 Senate Report, at 5, which concluded that a judge should sentence a youth as an adult only when he is convinced that the youth is "incorrigible" and would "derive no help" from commitment to F.Y.C.A. facilities. Similarly, the 1950 House Report implies that the Act is not for the "mature," "sophisticated" and "hardened" criminal. 1950 H.Rep. 2-3. But only a few youth offenders would be so incorrigible as to warrant denial of commitment to an F.Y.C.A. facility.[10]

Thus given Congress' deep-felt concern, which the legislative history strikingly illustrates, about the need to devise a unique sentencing and correctional system for a special class of offenders, sound construction of the F.Y.C.A. requires that before a judge sentences a youth offender as an adult he should make explicit the required § 5010(d) "no benefit" finding. He should also give supporting reasons to ensure that his decision comports with the special goals manifested by the legislation.

### C. *There Is No Legislative History Indicating That the § 5010(d) Finding May Be Implicit and Without Supporting Reasons*

In its memorandum in response to the petition for *certiorari*, respondent did not analyze the language of § 5010(d) or discuss the goals of the F.Y.C.A. These primary tools of statutory construction do not support respondent's position that § 5010(d) is satisfied by an implicit finding that a youth offender will not derive benefit from commitment to an F.Y.C.A. facility, before he is sentenced as an adult. In-

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[10] As Circuit Judge John Parker said during the 1949 Senate Hearings, at 48:

"... when you are dealing with youth offenders ... the chief purpose of punishment, excepting in the *very exceptional cases*, the chief purpose should be to reform the offender." (emphasis supplied).

stead, respondent asserts that two small parts of the legislative history support its position. Memorandum for the United States, filed November 19, 1973, at 5-7 (hereinafter "Memorandum"). But one argument from the history is clearly erroneous, and the second is not on point.

*First,* respondent, in footnote 5 of its Memorandum, implies that the original version of the F.Y.C.A., submitted to Congress in 1943, H.R. 2140, 78th Cong. 1st Sess. (1943), explicitly required a statement of reasons from a sentencing judge, before he sentenced a youth offender as an adult, but that this requirement was deleted in later versions of the legislation. But the statutory language to which respondent refers in the footnote had *no* applicability to the decision to sentence youth offenders as adults rather than under the special youth act. It applied instead to the sentencing of adult offenders.[11] Respondent apparently does not realize that the original bill dealt with the sentencing of youth and adult offenders in separate sections. The *adult* provisions were dropped in later versions. Accordingly, this argument advanced by the respondent is clearly erroneous.

*Second,* respondent quotes statements from the 1949 Senate Hearings by various members of the judiciary who were proponents of the legislation and by Senator Kilgore, the bill's sponsor. See Memorandum, at 5-6. For example, Judge Parker is quoted as saying: the bill "does not inter-

[11] The language quoted in footnote 5 of respondent's Memorandum comes from Title II, § 1, of the draft bill. This section clearly refers to "offenders." "Offender" is defined in Title I, § 2(g), as "a convicted person *other than a youth offender.*" (emphasis supplied). Thus, the original bill's requirement that, with respect to "offenders," the judge must "state his reasons, which shall be reduced to writing" had no applicability to the sentencing of "youth offenders." And its subsequent deletion has no relevance to the issue before this Court.

fere with the power of the judge . . . with respect to . . . [youth] offenders, but gives him merely an alternative method of treatment of these people." This and the other statements quoted by respondent, however, only support a position that both parties and *amici* adhere to, *viz.*, the F.Y.C.A. does not *require* the sentencing judge to commit a youth offender to F.Y.C.A. facilities. The question before this Court is not whether the sentencing judge has the discretionary power to sentence a youth offender as an adult —obviously he does—but rather how that discretion is to be exercised consistent with the goals of the legislation. *Amici* respectfully submit that the only sound reading of § 5010(d) in the context of the F.Y.C.A.'s legislative history is that it requires an explicit finding, supported by reasons, before a youth offender may be denied treatment in one of the special youth facilities established by Congress.

## II.

**Circuit Courts Which Have Considered the Issue *En Banc* Have Decided That the Language and Legislative History of the Act Require That an Explicit Finding Supported by Reasons Be Made by the Sentencing Judge.**

The Second Circuit and the D.C. Circuit are the only two United States Courts of Appeals which have addressed themselves *en banc* to the question herein presented by exploring at length the purpose and Congressional history of the Act. Both courts agreed, with only a single dissenter among 19 circuit judges,[12] that the Act requires an explicit "no benefit" finding supported by reasons. *United States* v. *Kaylor,* No. 73-1530 (2nd Cir., February 11, 1974) (*en*

[12] Judge MacKinnon dissented from *United States* v. *Coefield, supra,* 476 F.2d at 1161 (D.C. Cir. 1973).

*banc*); *United States* v. *Coefield*, 476 F.2d 1152 (D.C. Cir. 1973) (*en banc*).

The Second Circuit held:

> "We are unanimously of the view, then, that the language of the Act, its intent and purpose, coupled with the practical consequences of any decision otherwise, require a construction that a finding of no benefit under § 5010(d), whether requested or not, be made explicit in the record, preferably at the time of imposing sentence."
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> • • •
>
> "The question whether the trial court must state reasons in connection with its findings of no benefit, while arguably somewhat more difficult, is nevertheless answered largely by the legislative history and on essentially the same basis that the explicit-implicit question was resolved . . . [that] a statement of reasons by the sentencing judge is 'essential to a knowledgeable administration of the Act as intended by Congress.'" *United States* v. *Kaylor, supra*, Slip Op., pp. 8, 12.

Both the *Kaylor* and the *Coefield* courts relied on the legislative history we have set out in Section I to document the Congressional intent to establish a separate diagnostic and treatment system, which would presumptively apply to youthful offenders in order to protect them from contamination by older offenders and divert them from long-term criminal careers.

The reasoning of both the *Kaylor* and *Coefield* decisions was that, since the Act requires the court to make a finding of "no benefit" before imposing an adult sentence, implying that finding from the mere fact of an adult sentence would render the requirement of § 5010(d) nugatory. *United States* v. *Kaylor, supra*, Slip. Op., p. 8. At the same time, requiring a search through the record for an implicit finding would involve an appellate court in a maze because

"there will be the greatest room for differences of opinion as to whether such a finding is to be implied." *Id.* If trial courts are conscientiously to follow the Act,[13] the "no benefit" finding must be explicitly stated. See *United States* v. *Kaylor, supra,* Slip Op., p. 10 n. 9; *United States* v. *Coefield, supra,* 476 F.2d at 1156.

Furthermore, both the *Kaylor* and *Coefield* courts agreed that the judge under § 5010(d) must indicate his reasons for a finding of "no benefit":

> ". . . to assure in every case: firstly, that the District Judge manifest not only an awareness that the Act is applicable to the case, but also an accurate understanding of the scope of his discretion under the Act; secondly, that the District Judge has been informed of the pertinent facts relating to the individual defendant before him, either by evidence coming to his attention in the trial, by a presentence report, or by a recommendation and report made under section 5010(e); and thirdly, that the District Judge, by his statement of reasons where required, has given consideration and related the facts of the individual case to the applicable law. If these requirements are satisfied, there should be no large numbers of appeals calling for review of sentences which call for consideration of the Youth Corrections Act." *United States* v. *Coefield, supra,* 476 F.2d at 1157-1158.

As the *Kaylor* court concluded:

> "In sentencing under the Youth Corrections Act, . . . a court necessarily must face up to the proposition . . . that Congress has indicated a clear preference for the objective of rehabilitation both in the legislative history of the Act and in the statutory language that is

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[13] See *United States* v. *Kaylor, supra,* Slip Op., p. 11:

". . . a statement of reasons has direct beneficial effects at the district court level in terms of—in and of itself—contributing to rational decision making and focusing consideration on the question of benefit of treatment under the Act."

> utilized. Indeed, sentencing under § 5010(d) is conditioned on a prerequisite finding of fact and absent such a finding—that of 'no benefit'—sentencing thereunder is improper. There is no rational way in which we can determine whether such a finding is adequately supported in the absence of a statement of reasons underlying it as an ultimate finding. Slip Op., pp. 11-12.[14]

A requirement of an explicit finding of "no benefit" supported by reasons does not, as respondent suggests in its Memorandum, p. 5, create "an exception to the rule that, unless a constitutional limitation is violated, sentencing is a matter wholly within the trial judge's discretion and does not require the entry of articulated and reviewable reasons supporting the punishment imposed". It merely permits a traditional kind of review for legal error or failure to consider legally mandated criteria.[15] As the *Kaylor* court said:

> "[We] do not hereby propose even in this field unlimited appellate review. Rather as the District of Columbia Circuit also held in a companion case to *Coefield, United States* v. *Reed,* 476 F.2d 1145, 1150 (D.C. Cir. 1973), 'An appellate court can only be concerned with the rationality of [the] factors [which informed and shaped the particular exercise of the trial court's discretion], in relation to the congressional objectives.' We take the view, as did the *Reed* court, that 'where the rationality is present and visible' the appellate court function is at an end." Slip Op., p. 13.

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[14] Both the *Kaylor* and *Coefield* decisions allow a District Judge to adopt relevant and valid reasons supporting a finding of "no benefit" set out in a diagnostic report prepared under § 5010(e). *United States* v. *Coefield, supra,* 476 F.2d at 1157; *Kaylor* v. *United States, supra,* Slip Op., p. 11.

[15] See *e.g., United States* v. *Carter,* 225 F. Supp. 556 (D.D.C. 1964); *Rogers* v. *United States,* 326 F.2d 56 (10th Cir. 1963); *DeWitt* v. *United States,* 383 F.2d 542 (5th Cir. 1967).

Indeed, an explicit finding of "no benefit" supported by reasons will limit, not expand, appellate review of F.Y.C.A. sentences. If an appellate court must hunt and peck through an entire record to ascertain whether the judge made an "implicit" finding of "no benefit," and why, its review will be both more comprehensive, speculative, and time-consuming than that contemplated in *Kaylor* and *Coefield*. Experience in other circuits with the implicit finding rule has resulted in numerous remands, leading Circuit Courts (besides the Second Circuit and the D.C. Circuit) to require explicit findings, often with reasons, on remand as part of their supervisory jurisdiction. See *Cox* v. *United States*, 473 F.2d 334, 337 (4th Cir. 1973) (*en banc*) (remand for explicit findings and reasons); *United States* v. *Jarratt*, 471 F.2d 226, 230 (9th Cir. 1972) (express finding of "no benefit" to be made on resentencing); *United States* v. *Schenker*, 486 F.2d 318 (5th Cir. 1973) (remanded for "appropriate findings" under 18 U.S.C. § 5010(d)); *Williams* v. *United States*, 476 F.2d 970, 972 (3d Cir. 1973) (findings prescribed in 18 U.S.C. § 5010(b)-(d) must hereafter be made in open court on the record because of "the increasing number of federal cases raising problems similar to that involved in this appeal"); *United States* v. *MacDonald*, 455 F.2d 1259 (1st Cir. 1972), *cert. den.*, 406 U.S. 962 (remand to make findings required by the F.Y.C.A.). In all, seven out of ten Circuits have found it necessary to lay down requirements for an explicit finding, either as a general rule or in specific cases.

In fact, no court which has directly addressed the issue, except perhaps the Seventh Circuit in this case,[16] has ever

[16] *United States* v. *Bamberger*, 456 F.2d 1119, 1128 n. 7 (3rd Cir. 1972), and *United States* v. *Walker*, 469 F.2d 1377, 1381 n. 4 (1st Cir. 1972), summarily dismissed, each in a footnote, without any consideration of legislative history or existing case law, arguments that an adult sentence was illegal without an explicit "no benefit"

questioned that a district judge must make a specific finding, implicit or explicit, of "no benefit" under § 5010(d) and that his finding must be based on relevant facts in the record which fall within the legal scope of his discretion under the statute. See, *e.g.*, *Cox* v. *United States, supra,* 473 F.2d at 337; *Williams* v. *United States, supra,* 476 F.2d at 971; *United States* v. *Jarratt, supra,* 471 F.2d at 230.

Thus, it is not the D.C. Circuit, but the Seventh Circuit which is out of step and in conflict with the other circuits, insofar as it appears to negate the requirement of any such finding. Without express findings supported by reasons, there can be no assurance that the F.Y.C.A. is being followed and a §5010(d) finding is being made on the basis of the law and the record.[17] There cannot be uniform application of the Act in any circuit, proper supervisory guidelines for its application, or monitoring of its administration, unless the district judge is required to make an explicit "no benefit" finding supported by reasons.

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finding. In *Bamberger* an "implicit" basis for the adult sentence was found in the aggravated circumstances of the crime; in *Walker* it was inferred on the lack of any "antisocial" tendencies in the draft-resisting defendant. In the Third Circuit, a later *en banc* case required explicit "no benefit" findings in all future cases. See *Williams* v. *United States, supra.* In the First Circuit, other cases have been remanded for explicit "no benefit" findings. See *United States* v. *MacDonald, supra.* The persuasiveness or authority of either the *Bamberger* or *Walker* case is extremely dubious.

[17] See, *e.g.*, *United States* v. *Wilson,* 450 F.2d 495 (4th Cir. 1971) (judge either did not remember Act or misunderstood its applicability); *Williams* v. *United States, supra,* (judge said he considered Act but appellate court required express findings in future); *United States* v. *Jarratt, supra,* (court said nothing about § 5010(d), intention must be clarified on remand); *United States* v. *Schenker, supra,* (appellate court remanded to settle dispute whether implicit finding had been made); *United States* v. *Coefield, supra,* (ambiguity in record made implicit findings impossible); *United States* v. *Kaylor, supra,* (judge's assertion he "always takes" F.Y.C.A. "into consideration" not sufficient); *United States* v. *MacDonald, supra,* (judge mistaken about applicability of F.Y.C.A. to narcotics cases.)

## III.

**This Case Does Not Present a Proper Occasion for Resolving Broader Issues Under the F.Y.C.A.**

It is important to recognize that the issue which respondent urged this Court to resolve in this case—an asserted conflict between the D.C. Circuit and other Circuits "regarding the need to supply *detailed, reviewable reasons* in support of the conclusion that sentencing under Section 5010(d) is appropriate" [18]—is not properly presented here. Respondent concedes that:

> "To the extent that the court of appeals (*sic*) disagree about the need for the district court to make explicit its conclusion that a particular defendant will not benefit from treatment as a youth offender under Sections 5010(b) or (c), the conflict is one of limited substantive importance that need not be resolved by this Court." (Memorandum, pp. 11-12)

Respondent further concedes:

> "[I]f some of the circuits in order to assure that the district court has in fact considered the possibility of youth offender sentencing, desire an explicit statement on the record to that effect, we believe that is the kind of supervisory, 'housekeeping' matter that does not require uniform national treatment." (*Id.*, p. 12 n.9)

No wider conflict is before this Court for decision. The Seventh Circuit did not deal with whether "detailed, reviewable" reasons for an adult sentence are required, since it did not even require the explicit statutory finding of "no benefit". As we have shown, the Seventh Circuit erred, and an explicit statutory finding of "no benefit" supported by

[18] Memorandum, p. 12.

reasons is required. But the degree to which the finding must be supported by "detailed" reasons, the extent to which those reasons are reviewable on appeal, and the standard of any review are all questions which can and should be left to decision for another day.[19]

It would be unwise for this Court to decide any of the broader questions tendered to it by respondent. This is so for reasons over and above the familiar principle which counsels against decision of issues not before the Court.

*First,* it would be incongruous for this Court to decide broader issues under the F.Y.C.A., many of which have arisen in the District of Columbia, without a case from the D.C. Circuit before it. As the Second Circuit observed in *United States* v. *Kaylor, supra,* the Seventh Circuit gave only summary treatment to the F.Y.C.A. question in the present case. Slip Op., p. 3 n. 3. It evinced lack of familiarity with the legislative history and even with the decisions of other Circuits construing the Act. *Id.* The D.C. Circuit, on the other hand, has dealt in depth with F.Y.C.A. problems for years and has acquired extensive knowledge of the background and the operations of the Act.[20]

---

[19] Other questions which have arisen in the District of Columbia and were detailed in respondent's Memorandum (pp. 10-11) are likewise not before this Court. There is no issue here whether, if a finding of "no benefit" is required, adoption by a district court of the recommendations of a report under § 5010(e) will satisfy the requirement; or whether the recommendations of a § 5010(e) report, if relied on by a district court to make a "no benefit" finding are subject to judicial review; or whether reasons must be stated when a judge sentences a youth under § 5010(c) rather than § 5010(b).

[20] Moreover, the District of Columbia Court of Appeals, which is now the highest court of the District of Columbia under the D.C. Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473, has adopted the views of the D.C. Circuit as set forth in *United States* v. *Coefield, supra.* See *Small* v. *United States,* 304 A.2d 641 (1973).

*Second,* the District of Columbia is a unique jurisdiction from the standpoint of the F.Y.C.A. A substantial body of case law has been carefully built up in the District of Columbia to take account of the special problems and needs of the District. The evolution of standards under the F.Y.C.A. should not be brought to a halt by this Court, as respondent would have it do.

As originally enacted in 1950, the F.Y.C.A. did not apply to the District of Columbia. (64 Stat. 1085). In 1952 Congress extended its coverage to the District of Columbia and deliberately included not only youths convicted of U.S. Code violations but also of common law crimes under the D.C. Code. (§§ 5024, 5025, 66 Stat. 45-46). Only in the District of Columbia is the F.Y.C.A. applicable to both classes of offenders; elsewhere in the country it applies only to those convicted of U.S. Code offenses. An experienced District Judge in the District of Columbia has written:

> "There are many offenders below the age of 22 who come before this Court who can be and have been rehabilitated through the Youth Corrections Act program. Congress has wisely put such a program into effect and experience has emphasized and reemphasized the validity of this approach to many young offenders in a community such as Washington, D.C." *United States* v. *Alsbrook,* 336 F. Supp. 973, 980 (D.D.C. 1971)

The District of Columbia also has a far greater number of F.Y.C.A. cases than any other federal jurisdiction. F.Y.C.A. sentencing determinations are made in both the United States District Court and the Superior Court of the District of Columbia.[21] The District of Columbia now oper-

[21] F.Y.C.A. sentencing determinations in the District must be made in a large number of misdemeanor cases under the D.C. Code, as well as U.S. and D.C. Code felonies. *Harvin* v. *United States,* 445 F.2d 675 (D.C. Cir. 1971).

ates two Youth Centers at Lorton, Virginia, with facilities for over 600 inmates; establishment of a second Youth Center was ordered by the District Court in 1971 pursuant to its supervisory authority over the administration of criminal justice in the District. See *United States* v. *Alsbrook, supra,* 336 F. Supp. at 980-81. According to figures compiled by the District of Columbia Department of Corrections, there were 724 F.Y.C.A. commitments to the District of Columbia Youth Center in fiscal 1972. District of Columbia Department of Corrections, Summary Report 1967-1972, p. 51; and see *United States* v. *Riley,* 481 F.2d 1127, 1139 n.11 (D.C.Cir. 1973) (dissenting opinion of MacKinnon, J.) By contrast, in the same year, 1155 youths were committed under the F.Y.C.A. from all federal district courts into all youth centers operated by the Federal Bureau of Prisons. Federal Bureau of Prisons Statistical Report, Fiscal Years 1971 and 1972, p. 60.

It is against this background of high volume urban crime, which has severely taxed the courts and correctional facilities of the District of Columbia, that the D.C. Circuit and other courts in the District have attempted to regularize sentencing procedures under the F.Y.C.A. Contrary to respondent's view, the D.C. Circuit has not straitjacketed District Judges in sentencing under the F.Y.C.A. or sanctioned intermeddling by appellate courts in the sentencing process. In its leading *en banc* decision, the D.C. Circuit specifically held:

> "In providing for reasons to be stated by the District Court we are not seeking to elicit any litany or prescribed formula. . . . If these requirements [of giving reasons] are satisfied, there should be no large number of appeals calling for review of sentences which call for consideration of the Youth Corrections Act." *United States* v. *Coefield, supra,* 476 F.2d at 1157-58.

As the D. C. Circuit further stated in its companion *en banc* opinion in *United States* v. *Reed & Hoston, supra,* 476 F.2d at 1150:

> "The awesome and difficult task of sentencing continues to be vested in the one man who is best circumstanced to discharge it wisely, that is to say, the trial judge. The Youth Corrections Act does not change that, nor does it contemplate wholesale appellate intrusion into that process."

A requirement of a "no benefit" finding supported by reasons will help to bring order and rationality into the difficult function of sentencing under the F.Y.C.A. Judge Wilkey put the point well in *United States* v. *Waters, supra,* 437 F.2d at 723:

> "What happens to an offender after conviction is the least understood, the most fraught with irrational discrepancies, and the most in need of improvement of any phase in our criminal justice system."

## CONCLUSION

The guiding statutory goals and principles which emerge from an analysis of the legislative history indicate profound Congressional concern about a special class of offenders: a concern which led, as has been noted, to the formulation of special goals for sentencing youth offenders, creation of a comprehensive treatment system to meet a variety of rehabilitative needs, and establishment of a presumption in favor of commitment to an F.Y.C.A. facility rather than incarceration in an adult correctional institution.

Only through a requirement of an explicit "no benefit" finding, supported by reasons, can the important Congressional objectives manifested by the statute be properly implemented.

For these reasons and those set forth in petitioner's Brief, the judgment of the court below should be reversed and the case remanded for reconsideration of sentencing under the F.Y.C.A.

Respectfully submitted,

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# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 1 |
| Statutes involved | 2 |
| Statement | 4 |
| Introduction and Summary of Argument | 6 |
| Argument: | |
| I. The legislative history of the Youth Corrections Act clearly demonstrates that Congress intended disposition of convicted youth offenders to remain wholly within the discretion of the sentencing judge | 15 |
| II. Section 5010 of the Act does not impose mandatory substantive standards or require adherence to particular procedures such as express findings or statements of reasons in the sentencing of youth offenders | 26 |
| A. The Act does not limit the judge's discretion in sentencing youth offenders by imposing mandatory substantive standards | 28 |
| 1. The language of the Act does not support the Coefield and Kaylor decisions | 32 |
| 2. The Coefield-Kaylor approach may deprive district courts of valuable flexibility in sentencing decisions | 36 |




534-490—74——1

Argument—Continued
B. The Act does not alter traditional sentencing procedures, under which sentencing need not be accompanied by explicit findings or statements of reasons and are not subject to appellate review ..... Page 41
1. The Act does not require the making of explicit "no benefit" findings ..... 46
2. The Act does not permit appellate courts to require a statement of reasons ..... 49
3. Requirements of express findings and statements of reasons cannot be justified as necessary for facilitation of appellate review ..... 54
III. Constitutional considerations do not require that Section 5010(d) be construed as it has been in *Coefield* and *Kaylor* ..... 57
Conclusion ..... 62

Cases:

*Blockburger* v. *United States*, 284 U.S. 299 ..... 58
*Cherry* v. *United States*, 299 F. 2d 325 ..... 41
*Citizens To Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 ..... 47
*Cox* v. *United States*, 473 F. 2d 334, certiorari denied, 414 U.S. 869 ..... 28, 45, 60
*D.C. Federation of Civic Associations* v. *Volpe*, 459 F. 2d 1231, certiorari denied, 405 U.S. 1030 ..... 47
*Farries* v. *United States*, 484 F. 2d 948 ..... 61
*Goldberg* v. *Kelly*, 397 U.S. 254 ..... 61
*Gore* v. *United States*, 357 U.S. 386 ..... 55

Cases—Continued


| | Page |
|---|---|
| *Guidry* v. *United States*, 317 F. Supp. 1110, affirmed 433 F. 2d 968 | 29 |
| *Hart* v. *United States*, C.A. 5, No. 73-3139, decided January 28, 1974 | 59 |
| *Harvin* v. *United States*, 445 F.2d 675, certiorari denied, 404 U.S. 943 | 36 |
| *Interpace Corp.* v. *City of Philadelphia*, 438 F.2d 401 | 47 |
| *Irvine* v. *California*, 347 U.S. 128 | 58 |
| *Kawakita* v. *United States*, 190 F.2d 506, affirmed 343 U.S. 717 | 58 |
| *Kent* v. *United States*, 383 U.S. 541 | 60 |
| *Marshall* v. *United States*, No. 72-5881, decided January 9, 1974 | 59 |
| *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912 | 51 |
| *Morrissey* v. *Brewer*, 408 U.S. 471 | 51, 52, 61 |
| *North Carolina* v. *Pearce*, 375 U.S. 711 | 61 |
| *Phillips Co.* v. *Dumas School Dist.*, 361 U.S. 376 | 58 |
| *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17 | 58 |
| *Reed* v. *United States*, 312 A.2d 775 | 46, 49, 57 |
| *Robinson* v. *United States*, 474 F.2d 1085 | 7 |
| *Rogers* v. *United States*, 326 F.2d 56 | 36, 42 |
| *Scarpa* v. *U.S. Board of Parole*, 477 F.2d 278, certiorari granted and remanded for a determination of mootness, 414 U.S. 809 | 61 |
| *School Dist. No. 7* v. *Weissenfluh*, 236 Ore. 165, 387 P.2d 567 | 48 |
| *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180 | 36 |
| *Small* v. *United States*, 304 A.2d 641 | 46 |
| *Specht* v. *Patterson*, 386 U.S. 605 | 61, 62 |

Cases—Continued


| | Page |
|---|---|
| *State Commission ex rel. Iowa Natl. Mutual Ins. Co.* v. *Florida Industrial Commission*, 151 So. 2d 636 | 48 |
| *Townsend* v. *Burke*, 334 U.S. 736 | 58 |
| *Taylor* v. *McKeithen*, 407 U.S. 191 | 51 |
| *United States* v. *Alsbrook*, 336 F. Supp. 973 | 7, 37 |
| *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1 | 48 |
| *United States* v. *Coefield*, 476 F. 2d 1152 | 19, 28, 29, 32, 37, 38, 39, 42, 43, 45, 46, 47, 54 |
| *United States* v. *Critchlow*, 459 F. 2d 973 | 42 |
| *United States* v. *Crapps* (*sub nom. United States* v. *Bamberger*), 456 F. 2d 1119 | 44, 45 |
| *United States* v. *Fonseca*, C.A. 5, No. 73–2875, decided March 6, 1974 | 46 |
| *United States* v. *Forrest*, 482 F. 2d 777 | 56 |
| *United States* v. *Hartford, et al.*, C.A. 4, No. 73–1704, decided February 15, 1974 | 55 |
| *United States* v. *Jarratt*, 471 F. 2d 226, certiorari denied, 411 U.S. 969 | 44, 45 |
| *United States* v. *Kaylor*, No. 73–1530, decided February 11, 1974 | 29, 32, 34, 35, 37, 38, 41, 42, 43, 46, 47, 50, 54 |
| *United States* v. *Lee*, 478 F. 2d 1400, certiorari denied *per curiam* Mo. 5256, November 19, 1973 | 59 |
| *United States* v. *Lowery*, 335 F. Supp. 519 | 7 |
| *United States* v. *MacDonald*, 455 F. 2d 1259, certiorari denied, 406 U.S. 962 | 45 |
| *United States* v. *Phillips*, 479 F. 2d 1200 | 29, 56 |
| *United States* v. *Reed*, 476 F. 2d 1145 | 43, 44 |
| *United States* v. *Riley*, 481 F. 2d 1127 | 56 |
| *United States* v. *Rosenberg*, 195 F. 2d 583, certiorari denied, 344 U.S. 838 | 55 |
| *United States* v. *Schenker*, 486 F. 2d 318 | 46 |

Cases—Continued
*United States* v. *Tillman*, C.A.D.C., No. 71–1352, decided June 6, 1973, vacated and rehearing *en banc* granted, August 10, 1973 — Page 56
*United States* v. *Toy*, 482 F. 2d 741 — 44
*United States ex rel. Travis* v. *Travis*, 319 F. Supp. 380 — 48
*United States* v. *Tucker*, 404 U.S. 443 — 55
*United States* v. *Underwood*, C.A. 4, No. 72–1207 decided December 18, 1973 — 45
*United States* v. *Valezquez*, 482 F. 2d 139 — 54
*United States* v. *Verra*, 203 F. Supp. 87 — 60
*United States* v. *Walker*, 469 F. 2d 1377 — 45
*United States* v. *Ward*, 454 F. 2d 992 — 28, 43
*United States* v. *Waters*, 437 F. 2d 722 — 28, 35, 43, 45
*United States* v. *Winer*, 459 F. 2d 975 — 36
*Williams* v. *New York*, 337 U.S. 241 — 11, 50, 51, 52, 58, 62
*Williams* v. *Oklahoma*, 358 U.S. 576 — 52, 58
*Williams* v. *United States*, 476 F. 2d 970 — 44
*Zuber* v. *Allen*, 396 U.S. 168 — 24

Statutes and rules:
Comprehensive Drug Abuse Prevention and Control Act of 1970, Title II, 84 Stat. 1242, 21 U.S.C. 801, *et seq.*:
21 U.S.C. 841(a) — 59
21 U.S.C. 844 — 4, 38
21 U.S.C. 844(a) — 10, 36
21 U.S.C. 844(b) — 10, 38
21 U.S.C. 849 — 14, 51
Federal Juvenile Delinquency Act, 62 Stat. 847, 18 U.S.C. 5031–5037, *et seq* — 7, 10, 60
Federal Youth Corrections Act, 64 Stat. 1085, as amended, 18 U.S.C. 5005, *et seq.*:
18 U.S.C. 5005 — 2, 8
18 U.S.C. 5006 — 2

Statutes and rules—Continued

Federal Youth Corrections Act—Continued

Page

18 U.S.C. 5006(e) ..... 2, 5–6
18 U.S.C. 5006(g) ..... 6
18 U.S.C. 5007 ..... 8
18 U.S.C. 5010 ..... 2, 8, 11, 26, 29, 32, 34, 35
18 U.S.C. 5010(a) ..... 2, 4, 8
18 U.S.C. 5010(b) ..... 2, 6, 8, 9, 10, 34, 35, 43, 45, 56
18 U.S.C. 5010(c) ..... 2, 6, 8, 9, 10, 32, 33, 34, 36, 40, 45
18 U.S.C. 5010(d) ..... 3,5, 9, 12, 13, 23, 27, 33, 34, 40, 43, 44, 45, 46, 48, 58
18 U.S.C. 5010(e) ..... 3, 9, 13, 16, 22, 23, 25, 34, 42, 43, 56
18 U.S.C. 5011 ..... 7
18 U.S.C. 5012 ..... 7, 37
18 U.S.C. 5017 ..... 3, 8
18 U.S.C. 5017(a) ..... 9
18 U.S.C. 5017(b) ..... 9
18 U.S.C. 5017(c) ..... 3
18 U.S.C. 5017(d) ..... 3
18 U.S.C. 5020 ..... 9
18 U.S.C. 5021 ..... 9
18 U.S.C. 5023(a) ..... 10, 41
18 U.S.C. 5023(b) ..... 10
18 U.S.C. 5024–5025 ..... 7, 31
18 U.S.C. 5025 ..... 8
18 U.S.C. 2312 ..... 21
18 U.S.C. 3575 ..... 14, 51
18 U.S.C. 3576 ..... 51
18 U.S.C. 3651 ..... 5, 10, 39, 41
18 U.S.C. 4083 ..... 36
18 U.S.C. 4208(a) ..... 10
18 U.S.C. 4209 ..... 7, 35
18 U.S.C. 4251, *et seq* ..... 10, 59

Statutes and rules—Continued
Federal Youth Corrections Act—Continued Page
28 U.S.C. 2255 5
22 D.C. Code 3202(d)(1) 31
Rule 23(1)(d) of the Supreme Court 58
Federal Rules of Civil Procedure:
Rule 23(b)(3) 47
Rule 52(a) 51
Federal Rules of Criminal Procedure:
Rule 11 5
Rule 32 4, 52
Rule 32(d) 5
Rule 35 5
Colo. Rev. Stat. § 39–19–1 62
Miscellaneous:
Bazelon, *Opening Remarks, Institute on Sentencing*, 54 F.R.D. 285 (1968) 56
Carter & Kunzel, *Forms of Adjudication For Use in Sentencing*, 44 F.R.D. 197 (1968 Rev.) 42
95 Cong. Rec. 14890 24
95 Cong. Rec. 14889 24
96 Cong. Rec. 1283 24
96 Cong. Rec. 8267 24
96 Cong. Rec. 15034–15036 24
Frankel, *Criminal Sentences* (1972) 39
Gottshall, *Sentencing the Youth and Young Adult Offender*, 26 Federal Probation Quarterly, No. 2 (1962) 22
Hearings before a Subcommittee of the Senate Committee on the Judiciary, Correction System for Youth Offenders, on S. 1114 and S. 2609, 81st Cong., 1st Sess 16, 17, 18, 19, 20, 21, 22, 26

Miscellaneous—Continued

Hearings Before a Subcommittee of the Senate Committee on the Judiciary, Federal Corrections Act, 78th Cong., 1st Sess. ..... Page 16, 26
Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, Federal Corrections Act and Improvement in Parole, on H.R. 2139 and H.R. 2140, 78th Cong., 1st Sess. ..... 16, 20
H. Rep. No. 2979, 81st Cong., 2d Sess. ..... 23
H.R. 2140, 78th Cong., 1st Sess. ..... 26
Kadish, *The Advocate and the Expert, Counsel in the Peno-Correctional Process*, 45 Minn. L. Rev. 803 (1961) ..... 51
President's Commission on Law Enforcement and Administration Report, *The Challenge of Crime in a Free Society* (1967) ..... 52–53
S. 895, 78th Cong., 1st Sess., Title II § 1 ..... 25, 26
S. Rep. No. 1180, 81st Cong., 1st Sess. ..... 20, 22, 23

# In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5284

DOUGLAS RAYMOND DORSZYNSKI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 484 F. 2d 849.

### JURISDICTION

The judgment of the court of appeals (A. 55) was entered on July 20, 1973. The petition for a writ of certiorari was filed on August 16, 1973, and was granted on December 10, 1973. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether a convicted youth offender may be sentenced under applicable penalty provisions other than the Federal Youth Corrections Act without explicit

findings by the district court, together with a detailed statement of reasons in support thereof, that the defendant will not benefit from treatment as a youth offender under the Youth Corrections Act, 18 U.S.C. 5010.

## STATUTES INVOLVED

Relevant provisions of the Federal Youth Corrections Act (18 U.S.C. 5005 *et seq.*) are as follows:

> 5006. *Definitions.*
>
> * * * * *
>
> (e) "Youth offender" means a person under the age of twenty-two years at the time of conviction.
>
> 5010. *Sentence.*
>
> (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.
>
> (b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter; or
>
> (c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of

imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

(e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings.

5017. *Release of Youth Offenders.*

* * * * *

(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed

by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

STATEMENT

1. Petitioner's counsel informed the United States District Court for the Eastern District of Wisconsin that petitioner, who was nineteen years old, intended to plead guilty to the pending charge against him of possessing a controlled substance (L.S.D.), in violation of 21 U.S.C. 844, and requested that a presentence investigation be completed prior to the plea. See Rule 32, Fed. R. Crim. P. At a hearing prior to petitioner's plea, government counsel told the court that the maximum penalty for the violation was one year's imprisonment and a fine of $5,000, or both, and that petitioner might be subject to the Youth Corrections Act (A. 6). Petitioner stated to the court that he understood that this was the maximum penalty for his offense (A. 7). He also stated that no one had pressured him to plead guilty (A. 7–8) and that he did not believe any arrangement had been made regarding his sentence (A. 8).

After considering the presentence report and petitioner's argument that he should be placed on probation under the Youth Corrections Act (see 18 U.S.C. 5010(a)) (A. 11–13), the court sentenced petitioner to the custody of the Attorney General for one year. It ordered ninety days of the sentence to be served in a jail-type institution and suspended the execution of

the remainder, but placed petitioner on probation for two years upon his release from custody (A. 13–14). See 18 U.S.C. 3651.

Thereafter, petitioner moved the district court for withdrawal of his guilty plea, reduction of sentence, and release from custody under Rules 32(d) and 35, Fed. R. Crim. P., and 28 U.S.C. 2255 (A. 17–18). He argued, *inter alia,* that because the court, in alleged violation of the Youth Corrections Act (18 U.S.C. 5010(d)), had made no finding that petitioner would not derive benefit from treatment under that Act, it lacked jurisdiction to sentence him under other penalty provisions. At the same time he argued that his plea had been entered in violation of Rule 11, Fed. R. Crim. P., because he had not been advised that he was subjecting himself to incarceration for up to six years under the Youth Corrections Act (A. 17–18).

After a hearing, the district court denied petitioner's motion (A. 44). The court also ruled that it was not required to enter any specific finding that petitioner would not derive benefit from treatment under the Youth Corrections Act prior to sentencing him under other penalty provisions, and stated that in imposing sentence the court had "impliedly" held that youth offender treatment was not appropriate (A. 44–45).[1]

[1] The district court also denied petitioner's Section 2255 motion for release from custody based on the claim that his guilty plea had been induced by promises and coercion of an agent of the Bureau of Narcotics and Dangerous Drugs (A. 46). Moreover, the court revoked petitioner's probation on the ground that he had lied about the agent's promise. The court of appeals thereafter reversed and vacated the district court's summary revocation of probation, and that issue is not before this Court.

2. The court of appeals affirmed the district court's holding that Section 5010(d) of the Youth Corrections Act does not require explicit findings that a youth offender will not derive benefit from treatment under Sections 5010 (b) or (c) prior to sentencing under other applicable penalty provisions (A. 58):

> The legislative history of the Youth Corrections Act establishes that a purpose of the Act was to make available a system for the sentencing and treatment of youths to be used in the judge's discretion. See 1950 U.S. Code Cong. Service, p. 3983. It was designed to provide an alternative to sentencing as an adult under the Criminal Code.
>
> The record here supports the implication that after the petitioner's trial counsel had raised the possibility of sentencing the petitioner as a youth offender, the trial court determined that the petitioner would not derive benefit from treatment pursuant to section 5010 (b) or (c). Insofar as [*United States* v.] *Waters* [437 F. 2d 722, 725 (C.A.D.C.)] requires that the trial judge make an explicit finding to that effect, we decline to follow it.

## INTRODUCTION AND SUMMARY OF ARGUMENT

1. *The Structure of the Act.* The Youth Corrections Act of 1950 (18 U.S.C. 5005 *et seq.*, hereinafter referred to as the "YCA" or the "Act"), created a flexible new set of discretionary sentencing options to be used by district courts, in which particular emphasis is placed on rehabilitative treatment of "youth offenders"—*i.e.*, defendants under the age of

twenty-two at conviction (18 U.S.C. 5006(e))[2]—in cases where the trial court is of the view that the defendant would benefit from such treatment as opposed to sentencing under other applicable penalty provisions.

The Act defines "treatment" as meaning "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders" (18 U.S.C. 5006(g)) and provides that youth offenders committed under the Act "shall undergo treatment in institutions of maximum security, medium security, or minimum security types, including training schools, hospitals, farms, forestry and other camps, and other agencies that will provide the essential varieties of treatment." 18 U.S.C. 5011. Such institutions are to be used, in so far as practical, only for treatment of committed youth offenders, who are to be segregated from other offenders and grouped among themselves by classes according to their needs. *Ibid.*[3]

The Act created a Youth Corrections Division in the Board of Parole and gave the Division responsibility, *inter alia*, for ordering the conditional release and the unconditional discharge of committed youth offenders,

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[2] Youths under eighteen are usually subject to the Federal Juvenile Delinquency Act, 18 U.S.C. 5031–5037. The decision to proceed under these provisions is entrusted to the discretion of the Attorney General. 18 U.S.C. 5032. See p. 60, *infra*, n. 55. Since 1958, a "young adult offender" (*i.e.*, a defendant between the ages of 22 and 26) may be sentenced under the Youth Corrections Act if the court finds reasonable grounds to believe that he would benefit by the treatment authorized by that Act. 18 U.S.C. 4209.

[3] The Act provided that no youth offender shall be committed under the Act "until the Director shall certify that

(Continued)

and for advising the Director of the Bureau of Prisons as to general treatment and correction policies for such offenders. 18 U.S.C. 5005, 5007.

The decision to subject a youth offender to treatment under the Act is vested in the sentencing judge. Section 5010, the interpretation of which is at the heart of the instant case, makes available to the judge three sentencing options in addition to the choices existing under other applicable penalty provisions. The Act permits probation (Section 5010(a)) and offers two treatment alternatives to a sentencing judge. Under Sections 5010(b) and 5017, the judge may sentence the defendant for treatment and supervision of indeterminate duration up to six years from the date of conviction, the defendant being entitled to conditional release under supervision after no more than four years and to unconditional discharge at the end of six years. Alternatively, under Sections 5010(c) and 5017, a judge who is of the view that the defendant "may not be able to derive maximum benefit

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(Continued)

proper and adequate treatment and facilities and personnel have been provided." 18 U.S.C. 5012. We are informed by the Bureau of Prisons that in the 1950's two general certifications were made covering district courts in all circuits except the District of Columbia Circuit. (The administration of the treatment provisions of the Act as to District of Columbia offenders is split between the District Government and the Bureau of Prisons. 18 U.S.C. 5025.) It has been held that such general certifications were all that the Act contemplated, and that Section 5012 does not require certifications on a case-by-case basis. *Robinson* v. *United States*, 474 F. 2d 1085, 1090–1091 (C.A. 10). Compare *United States* v. *Alsbrook*, 336 F. Supp. 973 (D.D.C.) (requiring certification on case-by-case basis), with *United States* v. *Lowery*, 335 F. Supp. 519 (D.D.C.) (certification not required for commitment).

from treatment" within six years from conviction may sentence the defendant for treatment for any period authorized by law for the offense in question—the defendant then being entitled to conditional release two years prior to the expiration of the term imposed and to unconditional discharge at the end of that term. Under both alternatives, the Youth Division of the Bureau of Prisons may conditionally release a defendant at any time and may unconditionally discharge the defendant one year after conditional release. 18 U.S.C. 5017 (a), (b).[4]

In the event of unconditional discharge by the Division before the expiration of the maximum sentence imposed, or discharge from probation by the court before the end of the maximum period thereof, the conviction is automatically set aside and the offender is entitled to a certificate to that effect. 18 U.S.C. 5021.

In addition, Section 5010(e) permits the court, if it "desires additional information as to whether a youth offender will derive benefit from treatment" under Section 5010(b) or (c), to order the offender committed to the custody of the Attorney General for observation and study by the Division for up to 60 days, or for such additional period as the court may direct.

In lieu of the foregoing treatment, Section 5010(d) provides that the district court may sentence the offender under any other applicable penalty provi-

[4] At any time before unconditional discharge, the Division may require an offender to be returned to custody if it is of the view that he will be benefited by further treatment. 18 U.S.C. 5020.

534-490—74——2

sion [5] "[i]f the court shall find that the youth offender will not derive benefit from" the kind of treatment authorized under Section 5010(b) or (c).

The Act provides, moreover, that nothing in it was to "limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation," nor was it to be construed in any way to amend, repeal, or affect the provisions of 18 U.S.C. 3651, *et seq.*, concerning probation. 18 U.S.C. 5023(a).[6]

2. *Summary of Argument.* The Act was a product of the efforts of a committee of the Judicial Conference, which issued a report in 1942 proposing the establishment of a special correctional and rehabilitational system to be available for sentencing young persons convicted of federal crimes. Hearings were held by Congress on the Judicial Conference proposal in 1943 and again in 1949, and the Act as adopted in 1950 was substantially that recommended by the judges. It was adopted at a time when the discretion

[5] Other such alternatives include a straight adult sentence; a prescribed period of probation which may be preceded by up to six months' confinement (18 U.S.C. 3651); imprisonment for more than one year with specification of early eligibility for parole (18 U.S.C. 4208(a)); rehabilitation of narcotics addicts through treatment for drug dependency (18 U.S.C. 4251, *et seq.*); probation, withholding of judgment of conviction, and expungement of all records for simple drug possession charges (21 U.S.C. 844(b)). (Petitioner, who was convicted of a violation of 21 U.S.C. 844(a), was apparently eligible for consideration for this latter form of sentence, but it does not appear that it was requested on his behalf, and the record reflects no consideration of the possibility of a Section 844(b) sentence).

[6] Section 5023(b) makes similar provision with respect to the Federal Juvenile Delinquency Act, 18 U.S.C. 5031, *et seq.*

of federal trial judges in the area of sentencing criminal defendants was essentially unfettered and unquestioned (see *e.g., Williams* v. *New York,* 337 U.S. 241), and the legislative history abounds with statements by its principal congressional sponsor, Senator Kilgore, and by the judges and other representatives of the legal community who testified in support of the YCA, affirming the intention of the legislation simply to create an alternative mode of corrections for youth offenders, the use of which would be entirely optional with the sentencing judge. Not only was the election to use YCA sentencing to be entirely discretionary with the sentencing judge, but we have found no evidence in the legislative history suggesting an intent to impose specific procedural requirements for express findings or statements of reasons in connection with the exercise of that discretion—requirements so radical in light of traditional sentencing practices at the time that they surely would not have been adopted by Congress without a word to that effect in either the history or the language of the Act.

The language of Section 5010 confirms the intent of Congress to provide an optional alternative system of treatment for youth offenders without infringing in any way upon the traditional discretion of sentencing judges. This is demonstrated by the constant reiteration of the word "may" in describing the judge's power to impose each of the types of sentence permissible for a youth offender (probation; treatment for an indefinite period not to exceed six years; treatment for an indefinite period with a maximum incarceration of longer than six years; use of any other

applicable penalty provision). In no instance does the Act direct the judge to use any particuliar dispositional option.

The contrary reading of the District of Columbia and Second Circuits—that the Act *mandates* treatment under its provisions rather than imposition of an adult sentence whenever there is any prospect that treatment under the Act might assist to some extent in the rehabilitation of the youth offender—demonstrably thwarts the intention of the sponsors of the legislation. Moreover, the holding that the sentencing court "may" choose between treatment under the Act and use of other penalty provisions *only* in the case of offenders who it *already has determined will definitely not be helped by YCA treatment* assigns an absurd meaning to the language of Section 5010(d).

The foregoing observations in no way detract from the conclusion that, in adopting the Act, Congress was establishing a policy favoring greater emphasis on the use of specialized treatment to achieve the goal of rehabilitation in the case of youth offenders. However, the stress placed on the recognition of that policy and the fact that Congress sought in the Act to create a comprehensive alternative system of corrections for offenders sentenced to treatment thereunder (*e.g., Amici* Br. 7–8) simply begs the question that is at the heart of the present spate of YCA litigation—whether Congress implemented this policy by rigidly confining the traditional discretion of the sentencing judge and, if so, whether various procedures not expressly required by the Act should be imposed on the process of sentencing youth offenders in order

to insure faithful compliance by the sentencing judges with the Act's perceived mandate.

We submit that Congress did not so limit traditional sentencing discretion, that it did not deprive the judge of the flexibility to select the sentencing disposition that he concluded would be most advantageous to the interests of the offender and of society, and that it did not demand an undeviating focus on rehabilitation to the exclusion of other traditional sentencing considerations such as deterrence, protection of society, and punishment.

As a consequence of their erroneous premises as to the substantive content of the YCA, the District of Columbia and Second Circuits have held that, before a youth offender may be sentenced under any other applicable penalty provision, the Act imposes on the usual sentencing process an elaborate procedural structure involving (1) explicit findings under Section 5010(d) that the offender will not derive benefit from treatment under the Act; (2) a statement of reasons for such a finding; and (3) appellate review of those reasons to determine whether they are sufficient in light of what those courts have held to be the purpose of the Act.

The Act, however, does not purport to deal in any way with sentencing procedures (beyond providing district judges with an additional discretionary means of obtaining information concerning the appropriate sentence (Section 5010(e)). Congress clearly assumed that the sentencing decision was, as was then the uniform federal practice, being committed to the unreviewable discretion of the trial judge. Thus, the

entire focus of the legislative effort was directed to the development of a new, alternative correctional system for young offenders, with no intent to create, by implication, a radically new set of procedures for trial judges making sentencing decisions.

Neither the terms of the Act nor anything in its history requires that a judge, when sentencing a youth offender under other applicable penalty provisions, make such an explicit finding nor give a statement of reasons to support such a finding. Similarly, there is no basis in the Act or its history for concluding that Congress intended appellate courts to engage in any kind of judicial review of the determination of the district judge as to whether or not to sentence an offender to YCA treatment.

Requirements of explicit findings, reasons and review would have been contrary to well-established practice and precedent, and the wisdom of imposing such requirements is open to debate. The long-settled practices of not requiring judges to state reasons for the sentence they give, and of not permitting appellate review of a sentence that is within legal limits, both rest upon substantial policy grounds relating to the unique nature of the sentencing process. Congress has chosen not to alter those established practices except in very limited circumstances, where it has done so by explicit legislation. See, *e.g.*, 18 U.S.C. 3575(b), 3576, and 21 U.S.C. 849, providing for findings, reasons and appellate review in connection with a limited category of sentences. It cannot be assumed that Congress accomplished *sub silentio* in the Act

what it has elsewhere done explicitly. If the procedural requirements read into the Act by the District of Columbia Circuit, and the Second Circuit are desirable, it is for Congress, not the courts, to provide for them.

3. Although the constitutional claim discussed in petitioner's brief is not properly before the Court, not having been raised in the petition, we contend that there are no constitutional considerations that require or support the construction of the Act sought by petitioner and reflected in the court of appeals' decisions on which petitioner relies.

## ARGUMENT

### I. THE LEGISLATIVE HISTORY OF THE YOUTH CORRECTIONS ACT CLEARLY DEMONSTRATES THAT CONGRESS INTENDED DISPOSITION OF CONVICTED YOUTH OFFENDERS TO REMAIN WHOLLY WITHIN THE DISCRETION OF THE SENTENCING JUDGE

The legislative history of the YCA makes it unmistakably clear that the Act was not intended to limit in any way the traditionally broad discretion vested in sentencing judges. While required to sentence within the limits of the applicable sentencing alternatives, a judge is not required by the Act to impose any particular sentence in a given case.

The Act had its origins in a report of the Judicial Conference of the United States in 1942, which recommended enactment of provisions concerning sentencing and correction of both youth offenders and adults that had been drafted by a committee of federal

judges. Hearings were held on this proposal in 1943,[7] but no legislation resulted. Therefafter, in the 81st Congress, hearings were held in the Senate on a slightly revised version of the prior Judicial Conference proposal, which by then dealt only with youth offenders. See Hearings Before a Subcommittee of the Senate Committee on the Judiciary, Correctional System for Youth Offenders, on S. 1114 and S. 2609, 81st Cong., 1st Sess. (hereinafter "*Senate Hearings*"). The Judicial Conference's proposal was enacted without material amendment as the Youth Corrections Act of 1950.

During the hearings, Judge Bolitha Laws, a member of the Judicial Conference committee, described the sentencing options provided by the bill as being not an "absolute mandate" but rather "purely optional with a judge as to whether this treatment is to be given * * *." *Senate Hearings* 10. He stated that the bill simply provided "new alternatives" and "in no way reduces the authority or interferes with the sentencing power of the judges." *Id.* at 13. A judge could use the treatment alternatives "if he finds it fit to do so * * *." *Id.* at 15. Use of the law would be "purely an optional situation," and a judge "who does not want to use the new provisions, except perhaps rarely, does not have to use them." *Ibid.* After receiving a report requested under Section 5010(e),

[7] Hearings on S. 895 Before a Subcommittee of the Senate Committee on the Judiciary, Federal Corrections Act, 78th Cong., 1st Sess.; Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary, Federal Corrections Act and Improvement in Parole, on H.R. 2139 and H.R. 2140, 78th Cong., 1st Sess.

"the judge may deal with the offender entirely as he sees fit." *Id.* at 18.[8]

Judge John J. Parker, who chaired the Judicial Conference committee, gave like testimony (*id.* at 43–44):

> [T]he act * * * does not interfere with the power of the judge even with respect to those offenders [covered by the bill], but gives him *merely an alternative method of treatment* of those people. That is to say, under this bill the judge may still admit the youthful offender to probation. There is nothing in the bill that prevents that. He may still give the youthful offender the punishment prescribed by existing statutes, there is nothing in the bill that prevents that. All that the bill does is to provide that if *in his judgment and discretion,* he thinks that offender before the court is one that can be treated with advantage under this bill, he

[8] Judge Laws also recollected that in his advocacy of the bill he had met opposition from some federal judges (*Senate Hearings* 20–21):

"When they get the presentation fully made to them, and once they realize it is entirely optional and that some of us are not the types of experts that can look across a table into a man's eyes and know what sentence to give him, they say under those circumstances that they do not mind, for those of us who are frail, having the study made for us as long as they themselves are not restricted.

* * * * *

"The way I want to argue this with my brethren who oppose it is: let me do it and let them go on in the way they do.

"When I put that up to them, they say, 'All right, Judge, as long as you do not harrass me.' I will say to them that my prophecy is that at the end of 10 years they will all be doing it, and perhaps they will be doing it at the end of 5 years."

can sentence him under this bill instead of under the existing law.

* * * * *

Mr. Chairman, that is roughly the provision of the act as I understand it. I do not see any possible objection to it. They say that there are some of these fellows that ought to be given serious punishment notwithstanding their being young and *it does not prevent their being given serious punishment*. Nothing prevents a man from getting 25 years punishment if he deserves it. Nothing prevents his being executed if he deserves such sentence.

On the other hand, there is nothing to prevent the judge from sentencing him to probation if he thinks that is to be done.

All it provides is that in the case of those who need treatment, in the opinion of the judge, the judge shall be able to give them that treatment, and reclaim them to society. [Emphasis supplied.]

Judge Parker further noted that the goal of rehabilitation was only one of the goals of the correctional system, other purposes being protection of society and satisfaction of the requirements of justice, and while reform may be the chief purpose in dealing with youth offenders, it was not the sole purpose. *Id.* at 48. He reiterated that "there are some of them that ought to be punished and there is nothing in the bill that prevents that." *Id.* at 49.

During a discussion of objections by federal judges to an earlier bill, Senator Kilgore, the sponsor of the

YCA, similarly noted that two judges "objected to taking sentencing away from the court and giving it to an executive agency. But that has been answered in S. 2609 because it takes nothing away," to which another member of the Judicial Conference committee, Judge Orie L. Phillips, responded: "That is correct; it is purely optional." *Id.* at 69.[9]

Judge Phillips also testified, in response to the comment that the age limit originally proposed (24) was too high, as follows (*id.* at 67):

> Judge PHILLIPS. It may seem offhand like a high age but age in years does not always mean age in fact. A 23-year-old may be as old as another 16-year-old in mental development. *The judge has absolute discretion* in determining how old a person he shall sentence under this act.
>
> In other words, putting the age limit up to where we have does not compel anybody to sentence them up to that age limit. However, if he finds that a boy of 22 or 23 is involved he can use the act. That is *merely a flexibility and it is not a command* that he send the boys up.
>
> Senator KILGORE. *I agree with you on that* but I wanted your reaction. [Emphasis supplied.]

[9] Judge Phillips confirmed the great extent of individual discretion afforded under the Act in discussing a pair of ostensibly identical offenders who had been sentenced, respectively, under the Act and under other provisions. Such disparities would be permissible, but "a considerable measure of uniformity of policy" would be obtained because the release of both would ultimately be in the hands of the Parole Board. *Id.* at 66.

Judge Carroll Hincks, another member of the committee, observed, with respect to judges who had said they would not want to use the proposed treatment alternatives: "Very well, they do not have to use it." *Id.* at 57.[10]

James V. Bennett, Director of the Bureau of Prisons, who worked closely with the committee of judges, testified "that far and away the largest number of young offenders who would come to us under the bill are automobile theft cases * * *." *Id.* at 29.[11] Most of those cases were said to involve boys who have "gone on a junket" and would not need to go to prison once they were returned to parental control, but without the

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[10] Similar comments had been made in the hearings in 1943 concerning the earlier proposals. See, *e.g.*, Hearings on Federal Corrections Act and Improvement in Parole, *supra*, at pp. 9, 32, 34–36.

[11] In addition to automobile larceny, the other principal categories of crimes committed by persons under twenty-four years old who were committed to federal institutions in fiscal year 1949 involved immigration, other larceny, narcotics, forgery and liquor; robbery convictions were among the least common, accounting for only 34 out of 4896 commitments. *Senate Hearings* 22–23; S. Rep. No. 1180, *supra*, at p. 7. Subsequent history has confirmed Mr. Bennett's prediction, for until quite recently defendants convicted for violation of the Dyer Act (18 U.S.C. 2312), constituted more than fifty percent of all offenders committed each year under the Youth Corrections Act:

alternatives provided by the Act, "the judge has no way to cope with the problem." *Ibid.*[12]

At the conclusion of the hearing, during a colloquy with Senator Kilgore, James E. Palmer, Jr., President of the Federal Bar Association, summed up the discretionary philosophy incorporated into the provisions for sentencing and administering the incarceration of youth offenders (*id.* at 82):

> [T]his bill, turns upon the caliber and efficiency of our judges, and also on the ability of the men in charge of the program set up under the bill.
>
> I have enough confidence in the discretion of our judges to feel that they are not going to

(Continued.)

| Fiscal year | Dyer percent | Total YCA commitments | Number of YCA Dyer commitments |
|---|---|---|---|
| 1973 | 11.6 | 1,451 | 168 |
| 1972 | 14.5 | 1,149 | 167 |
| 1971 | 22.6 | 1,108 | 251 |
| 1970 | 38.2 | 1,160 | 443 |
| 1969 | 42.0 | 1,318 | 554 |
| 1968 | 53.3 | 1,138 | 607 |
| 1967 | 55.0 | 1,264 | 733 |
| 1966 | 57.7 | 1,132 | 653 |
| 1965 | 60.6 | 1,131 | 686 |
| 1964 | 63.1 | 1,149 | 725 |
| 1963 | 61.4 | 1,237 | 759 |
| 1962 | 62.4 | 1,182 | 737 |
| 1961 | 63.8 | 1,324 | 845 |
| 1960 | 56.7 | 1,326 | 752 |
| 1959 | 60.7 | 1,291 | 784 |

Source: Bureau of Prisons Annual Reports.

[12] Mr. Bennett also testified that it was difficult to see how any judge "could rightfully object to the bill because they can use it or not, as they see fit, and yet it gives them all of these additional services and alternatives." *Senate Hearings* 25. The bill added "no complicated procedures. The judge would simply decide whether the offender was to be treated under the terms of this bill * * *." *Id.* at 30.

> abuse this statute, and certainly that those who are charged with the direction of these people are not going to abuse it to the extent that it will ever rebound that we are here trying to set up a structure that will give the Government a reputation dealing too lightly with those who should be dealt with properly.[13]

The comments of the judges and others at the Senate hearings (there were no House hearings) were reflected in the committee reports on the bill. Thus, the Senate report described the bill as providing "a new alternative sentencing and treatment procedure," which "would not deprive the court of any of its present functions as to sentencing * * *." S. Rep. No. 1180, *supra,* at p. 1. The bill was said to be "most flexible" (*id.* at 5), and the treatment it authorized was described as "another alternative" which the court could use, in addition to probation, the Juvenile Delinquency Act, and any applicable law relating to the offense. *Id.* at 2. The discretionary nature of the proposal was further indicated in references to Section 5010(e), under which, "*should the court desire* additional information * * * as to whether the youth

[13] See also Gottshall, *Sentencing the Youth and Young Adult Offender*, 26 Federal Probation Quarterly, No. 2, 17 at 21-22 (1962):

"Section 5010(d) confers no benefits under the Act. It is generally regarded as nothing more than an affirmative statement that the court, convinced that treatment under 5010(b) or 5010 (c) would accomplish no good, has resort to the penalty authorized for the substantive offense. Actually, inquiry among several who assisted in the drafting of the Act confirmed the view that the subsection was included to assure the courts that the regular sentencing provisions were available when they felt that correctional treatment under the Act was inappropriate."

offender would derive benefit from the treatment contemplated under the proposal, it *may* commit the youth * * * for observation and study * * *." (*Ibid*; emphasis supplied). The report also stated that "[j]udges must ever keep in mind the public safety * * *." *Id.* at 5.[14]

The House report similarly described the bill as being "designed to make available for the discretionary use of the Federal judges" an additional sentencing system "that will promote the rehabilitation of those [youth offenders] who in the opinion of the sentencing judge show promise of becoming useful citizens * * *." H. Rep. No. 2979, 81st Cong., 2d Sess., at p. 1. The new alternatives in the bill were said to look "primarily" to rehabilitation. *Id.* at 3.[15]

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[14] *Amici* (Br. 10) have stressed a passing comment in the Senate report, in the context of a discussion of the provision for pre-sentence study of the offender, that, after receiving the report under Section 5010(e), the judge may sentence the offender under any other applicable law if "the judge is convinced the youth is incorrigible and would derive no help from the program * * *." S. Rep. No. 1180, *supra*, at 5. When viewed in context however, it is evident that this language was not intended to indicate that the judge must sentence under the Act unless the defendant is incorrigible and would derive no help from treatment thereunder. Rather, the language is descriptive. Such an offender is doubtless the prototype of the defendant who Congress expected would not be sentenced under the Act, but there is no indication that the sentencing judge's discretion was to be confined exclusively to such offenders, and the text of Section 5010(d) cannot sensibly be read to compel such an interpretation (See pp. 32–35, *infra*).

[15] See also Letter to Representative Celler, Chairman of the Committee on the Judiciary, dated June 21, 1950, from Peyton Ford, Deputy Attorney General, H. Rep. No. 2979, *supra*, at p. 8.

During debate on the bill, Senator Kilgore, its sponsor, assured the Senate that it "does not take away from the court any of its powers, but does give to the judges * * * the right [to sentence under the Act] * * *." 95 Cong. Rec. 14889. He added that the system proposed "does not interfere with their handling of the criminal, but gives [judges] * * * an additional facility to aid in trying to straighten out the offender." *Id.* at 14890. He further explained that "[t]he bill will not be compulsory in any sense of the word * * *" (96 Cong. Rec. 1283) and that "use of the system prescribed by the bill will not be mandatory." *Id.* at 8267.[16]

Thus, the legislative history of the Act time and again reflects the intent of the judges who drafted and proposed it[17] and of the congressmen who enacted it to create a new system of treatment and rehabilitation to be available for *optional* use by federal district judges in the case of a particular class of eligible defendants. The traditional broad discretion of district judges in sentencing matters was to be fully as applicable to the sentencing of youth offenders as to other convicted defendants. Not only was the Act not meant to mandate any particular correctional mode for the individual youth offender

[16] We have found nothing in the brief House debates (96 Cong. Rec. 15034–15036) relevant to the issues in this case.

[17] While testimony of witnesses at congressional hearings is not always a reliable guide to legislative intent, the views of the judges who helped draft the Act—which was primarily the result of the efforts of the Judicial Conference and dealt with the powers of judges in a role traditionally assigned to their discretion—carry far greater weight than most testimony. Cf. *Zuber* v. *Allen*, 396 U.S. 168, 192.

(although, of course, it embodied a general policy favoring rehabilitative treatment for youth offenders likely to respond favorably to such treatment), but its history is devoid of evidence of affirmative congressional intention to impose particular procedural requirements on the exercise of the sentencing judge's discretion. This silence is significant evidence that Congress, legislating against a background of essentially unfettered sentencing discretion, had no intent to impose what would have been rather revolutionary requirements on sentencing judges to observe particular sentencing procedures such as the making of express findings or the articulation of reasons in support of the sentencing decision.

Indeed, the earlier history of the YCA proposal strongly suggests that Congress would have expressed specific procedural requirements in the Act had it intended them to apply. As noted earlier, the version of the Act considered by Congress in 1943 contained provisions relating to both youth and adult offenders. In the case of the latter category of offenders (including youth offenders being sentenced under adult provisions), a sentence of imprisonment for more than one year could not be imposed by the court without first obtaining a recommendation from a Division on Adult Corrections that was to be created under the bill (a mandatory referral provision comparable to the optional provision contained in YCA's Section 5010(e)). If the judge's sentence diverged from the recommendation of the Division, he would have been required to give a written explanation on the record of his reasons for imposing a different sentence. S. 895, 78th

534-490—74——3

Cong., 1st Sess., Tit. II, § 1; see also H.R. 2140, 78th Cong., 1st Sess. The bills, which contained provisions substantially similar to present Section 5010(d), required no express findings or statement of reasons concerning the decision whether to sentence a youth offender under youth or adult sentencing provisions. See S. 895, *supra*, Tit. III, § 1(c).[18]

II. SECTION 5010 OF THE ACT DOES NOT IMPOSE MANDATORY SUBSTANTIVE STANDARDS OR REQUIRE ADHERENCE TO PARTICULAR PROCEDURES SUCH AS EXPRESS FINDINGS OR STATEMENTS OF REASONS IN THE SENTENCING OF YOUTH OFFENDERS

The question presented by the petition in this case is whether a district judge who declines to use the treatment alternatives authorized by the Act must accom-

[18] Moreover, even with respect to the requirement of a statement of reasons in connection with adult sentencing, there was to be "no review" under the bill, according to the chairman of the Judicial Conference committee, Judge John J. Parker. Hearings on S. 895, Before a Subcommittee of the Senate Committee on the Judiciary, Federal Corrections Act, 78th Cong., 1st Sess., at p. 6. The hearings revealed that some federal judges opposed the adult offender provisions as encroaching on the sentencing powers of federal judges (*e.g.*, Hearing on Federal Corrections Act, *supra*, at p. 14–15), and the controversial adult provisions were eliminated by the Judicial Conference committee before the legislation was resubmitted to the 81st Congress six years later. See *Senate Hearings* 9, 42–43.

As *Amici* note (Br. 14, n. 11), the abbreviated discussion of the 1943 proposal in our memorandum in response to the petition (p. 5, n. 5) may not have described the proposal with sufficient clarity. The requirement of a statement of reasons was not part of the youth offender provisions of the 1943 bills. The proposal is nevertheless relevant because it demonstrates that the draftsmen of the Act did, where such was their intent, require explicitly some of the procedural measures that petitioner and *Amici* contend are implicitly required by the Act.

pany the sentence imposed under otherwise applicable provisions with an explicit finding that the defendant "will not derive benefit" from such treatment and with a statement of supporting reasons for his determination. A negative answer to that question is required not only by the legislative history just examined but by a consideration of the nature of the substantive duty, if any, that the Act imposes upon a sentencing judge to use the alternatives provided thereby in particular cases. Thus, if the Court concludes, as we contend, that Congress did not limit the sentencing judge's usual discretion, and that the Act provides essentially an added dispositional alternative that the district court in its discretion may but need not use, then there is no basis for imposing the suggested procedural requirements.

On the other hand, if the Court were to agree with petitioner and the courts of appeals for the District of Columbia and Second Circuits that the sentencing judge is obliged to sentence a youth offender to treatment under the Act unless it can be said that the defendant is incorrigible and "will not derive benefit from treatment" (18 U.S.C. 5010(d)), the arguments in favor of an explicit finding, statement of reasons, and appellate review, required by those courts as necessary means of administering the Act, would be somewhat more persuasive, although not necessarily compelling.

A. THE ACT DOES NOT LIMIT THE JUDGE'S DISCRETION IN SENTENCING YOUTH OFFENDERS BY IMPOSING MANDATORY SUBSTANTIVE STANDARDS

Petitioner relies upon a line of decisions recently rendered by the Court of Appeals for the District of Columbia Circuit which have drastically altered the traditional functions of the district judge and the appellate court concerning the sentencing of youth offenders, most notably *United States* v. *Waters*, 437 F. 2d 722 (C.A.D.C.), and *United States* v. *Coefield*, 476 F. 2d 1152 (C.A.D.C.) (*en banc*). Taken together, *Waters* and *Coefield* read the Act as a rigid mandate to sentencing judges establishing a preferred ordering of sentencing options for youth offenders narrowly circumscribing their traditional discretion in imposing sentence. From that premise, *Waters* and *Coefield* hold in substance that a trial judge must sentence a youth offender to probation or treatment under the YCA except in the extraordinary case of a defendant who is so incorrigible that he will indisputably not derive any benefit whatever from rehabilitative treatment—*i.e.*, that it would be of "no value." *Waters, supra*, 437 F. 2d at 724–726; *Coefield, supra*, 476 F. 2d at 1154–1155; accord *United States* v. *Ward*, 454 F. 2d 992, 994 (C.A.D.C.).[19] In a subsequent decision applying *Coefield*, the court has said that a convicted youth offender has a "presumptive right" to YCA treatment.

[19] In *Cox* v. *United States*, 473 F. 2d 334, 337, 343–344 (C.A. 4) (*en banc*), certiorari denied, 414 U.S. 869, the Fourth Circuit expressed agreement with the *Waters* conclusion that the YCA imposes a preference for treatment to be imposed on all youth offenders unless the court affirmatively finds that the defendant will not benefit from it.

*United States* v. *Phillips*, 479 F. 2d 1200, 1205 (C.A.D.C.).

The *Coefield* interpretation of the Act was recently followed by the Second Circuit, which concluded that, in the YCA, "Congress, while carefully preserving judicial discretion, nevertheless *favored* treatment of youth offenders under the Act, *i.e.*, by way of rehabilitation." *United States* v. *Kaylor*, No. 73–1530 (C.A. 2), decided February 11, 1974 (*en banc*), slip op. 5709 (emphasis in original).[20]

In reaching these conclusions—supported here by petitioner (Br. 10) and *Amici* (Br. 4)—the courts have relied upon a selective and overly literal reading of the statute and have completely neglected the overwhelming legislative history discussed above, which demonstrates the entirely discretionary nature of the Act.

In enacting the YCA, Congress created new optional sentencing possibilities for youth offenders, under which rehabilitation was emphasized to a greater extent than under normal adult sentencing, although not to the total exclusion of other traditional considerations. See *Guidry* v. *United States*, 317 F. Supp. 1110, 1111–1112 (E.D. La.), affirmed, 433 F. 2d 968 (C.A. 5). By equipping the Bureau of Prisons with

[20] The filing of a petition for certiorari by the United States in *Kaylor* (*sub nom. United States* v. *Hopkins*) has been authorized, because of the possibility that, if the instant case is decided adversely to our position, this Court may nevertheless not reach several important questions regarding the duties of sentencing judges in youth offender cases reached in *Kaylor* but not necessarily essential to the disposition of the instant case.

the legal means to provide more refined and focused treatment and supervision than usual, and by authorizing indeterminate periods of custody that might be either shorter or longer than those permissible under a normal sentence, Congress may be said to have adopted in the YCA a general policy of facilitating and emphasizing treatment and rehabilitation of youth offenders in cases where the sentencing judge was of the view that the offender would benefit more from such treatment than from sentencing under other applicable penalty provisions.

The Act, however, consistent with the views of its sponsors, is entirely permissive and discretionary in its language. Section 5010 does not in terms require a judge to take any particular action in sentencing a youth offender. A judge who has doubts as to whether such rehabilitation could be accomplished within the period of treatment authorized under the Act has, in our view, discretion to decide whether YCA treatment is the most appropriate mode of disposition. Even when convinced that an offender would derive some rehabilitative benefit from YCA treatment, the judge is still free to determine that some other disposition will be more beneficial to the offender and to society, or is otherwise preferable. Nor is the judge required to consider only the question whether an offender might derive some rehabilitative benefit from such treatment, to the exclusion of all other factors normally considered in sentencing, such as deterrence, punishment and the protection of society. Cf. *Williams* v. *New York*, 337 U.S. 241, 248–249, n. 13. (See pp. 39–40, *infra*.)

In this connection it is important to recall that when Congress enacted the YCA the typical range of offenses committed by those potentially eligible for treatment under the Act was far more limited than is now the case. The District of Columbia was not originally covered by the Act and the principal category of offense committed by youths was interstate transportation of a stolen vehicle, frequently involving relatively minor episodes of "joy-riding." Relatively few serious offenses involving force and violence against the person, for example, were anticipated. See p. 20, n. 11, *supra,* and accompanying text.[21]

In short, such expectations as Congress may have had when considering the YCA as to the frequency with which treatment would be ordered (see *Amici* Br. 10–13) must be considered in relation to a more limited range of crimes likely to have been committed by those eligible for such treatment. In view of Congress' expressed concern for public safety (see p. 23, *supra*), it is fair to conclude that Congress was not barring a judge from considering traditional matters, in addition to potential rehabilitation, particularly when dealing with an offender guilty of an extremely serious or violent crime such as a murder, rape, assault and the like.[22]

[21] As originally adopted, the Act was not applicable in the District of Columbia. 64 Stat. 1089. It was amended in 1952 to apply to District of Columbia offenders. 66 Stat. 45; see 18 U.S.C. 5024–5025. In 1970, however, Congress excluded certain multiple offenders in the District of Columbia from eligibility for YCA treatment. See 22 D.C. Code 3202(d)(1).

[22] This is not to say, of course, that YCA treatment is never appropriate as to any particular category of offense, for, with one exception (22 D.C. Code 3202(d)(1)), Congress

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1. *The Language of the Act Does Not Support the Coefield and Kaylor Decisions.*—Heavy reliance is placed on the language of Section 5010(d) for the proposition that the Act requires that any youth offender who is not clearly incorrigible must be sentenced to probation or treatment under YCA (Pet. Br. 10; *Amici* Br. 4; *Coefield, supra,* 476 F. 2d at 1154-1155; *Kaylor, supra,* slip op. at 5710). While we do not dispute that the Act reflects a congressional policy favoring the goal of rehabilitation and treatment under YCA in appropriate cases, a careful reading of the language of Section 5010 confirms the finding

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plainly has not placed any such limits on the Act's applicability.

Our understanding of the optional and discretionary nature of the YCA is confirmed by more than twenty years of experience under the Act—prior to the series of radical departures from past practice recently inaugurated by the Court of Appeals for the District of Columbia Circuit. Thus, over the past fifteen years, the numbers of offenders between 18 and 21 committed for treatment under the Act was always less than the number committed as adults:

| Fiscal year | YCA percent | Total 18 to 21 | YCA |
|---|---|---|---|
| 1973 | 36.7 | 2,171 | 79[illegible] |
| 1972 | 34.8 | 1,838 | 64[illegible] |
| 1971 | 34.4 | 1,984 | 68[illegible] |
| 1970 | 39.6 | 1,997 | 79[illegible] |
| 1969 | 41.7 | 2,250 | 93[illegible] |
| 1968 | 37.1 | 2,284 | 84[illegible] |
| 1967 | 40.3 | 2,305 | 92[illegible] |
| 1966 | 42.9 | 2,029 | 87[illegible] |
| 1965 | 42.9 | 2,007 | 86[illegible] |
| 1964 | 44.0 | 2,070 | 91[illegible] |
| 1963 | 47.4 | 2,066 | 97[illegible] |
| 1962 | 44.7 | 2,047 | 91[illegible] |
| 1961 | 47.1 | 2,149 | 1,01[illegible] |
| 1960 | 46.5 | 2,112 | 98[illegible] |
| 1959 | 46.4 | 2,124 | 98[illegible] |

Source: Bureau of Prisons Annual Reports.

from the legislative history that YCA sentencing was not meant to be required in any individual case. In all cases, the language of the statute leaves the sentencing decision to the traditional discretion of the district judge. Section 5010(d) provides:

> If the court shall find that the youth offender will not derive benefit from treatment under [the YCA] * * *, then the court *may* sentence the youth offender under any other applicable penalty provision [emphasis supplied].

The suggestion that, in essence, only those who demonstrably will not derive any benefit (in the colloquial sense of the word)[23] from YCA sentencing may be sentenced under other applicable provisions wholly overlooks the meaning of the critical word "may", as shown by the rest of the statute and by the results of the *Coefield-Kaylor* reading of the statute. Under the *Coefield-Kaylor* view of Section 5010(d), all youth offenders must receive YCA sentences unless they are clearly not amenable to rehabilitation, in which case the judge may choose between YCA and other sentencing. This reading creates an absurd result—that the trial judge is given discretion whether or not to impose YCA sentencing only with respect to those offenders who he has already determined could not "benefit" therefrom. The word "may" in Section 5010

[23] The reference to "benefit" in Section 5010(d) (and in Section 5010(c)), was, we submit, plainly intended by Congress to mean, not simply benefit in some general sense, but rather correction of antisocial tendencies and rehabilitation into a "useful citizen." See p. 23, *supra*.

(d) becomes meaningful only if the district judge is afforded discretion in selecting a sentencing mode for offenders who might benefit from YCA sentencing, whereas, in order for the statutory language to support the *Coefield-Kaylor* interpretation, "may" would have to be replaced with "shall."

Indeed, the entire *Coefield-Kaylor* premise that Section 5010 mandates selection of particular sentencing modes for particular offenders, depending solely upon their predicted amenability to rehabilitation, is belied by the constant reiteration of the word "may" in every subsection of that provision. Thus, a judge *"may"* put a youth offender on probation under 5010(a); *"may"* sentence the offender to treatment for up to six years under 5010(b); *"may"* sentence him for treatment for a longer period under 5010(c) where the maximum sentence for the offense exceeds six years; and *"may"* sentence in accordance with other applicable penalty provisions under 5010 (d). In addition, under 5010(e), for assistance in making such determinations, the judge *"may"* order the offender committed for study if he *"desires"* additional information. If subsection (d) is read as a mandatory provision requiring use of subsection (b) or (c) for certain offenders, why do subsections (b) and (c), by their language, make the selection of YCA sentencing wholly discretionary? The *Coefield-Kaylor* reading of (d) forces it into flat contradiction with (b) and (c).

We recognize, as the Second Circuit pointed out in *Kaylor* (slip op. at 5710), that the language of Section 5010(d) would more clearly reflect what we have

argued to be the congressional intent and the meaning of the statute if it did not utilize the seemingly restrictive phrase "will not derive benefit" (although the affirmative locution suggested in *Kaylor* would make the provision redundant in light of Section 5010(b)). By the same token, the *Coefield-Kaylor* analysis would rest on firmer ground had Section 5010(d) provided for use of other applicable penalty provisions "*only* if the court shall find" no benefit. In sum, the statute is not so clearly worded in support of either view as to preclude resort to the legislative history and adoption of a construction consonant with the congressional purpose.

Overall, both the structure of Section 5010 and its history suggest that Congress was there seeking merely to describe the four special dispositional possibilities available in sentencing youth offenders, any one of which the judge "may" select, with broad guidelines set forth to aid the judge in the exercise of his discretion, and that Congress was not establishing mandatory dispositional requirements for various categories of offenders. It is doubtless for that reason that Congress in no instance used the word "shall" in setting forth the type of disposition appropriate for offenders with varying degrees of rehabilitational promise.[24]

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[24] The courts in *Waters* (437 F. 2d at 723–724, n. 7) and *Kaylor* (slip op. at 5711) have relied heavily upon differences in language between the YCA and a provision adopted eight years later which authorized YCA sentencing for so-called "young adult offenders," *i.e.*, those between 22 and 26. 18 U.S.C. 4209. The language and history of that enactment however, are not compelling evidence of congressional intention in passing

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2. *The Coefield-Kaylor Approach May Deprive District Courts of Valuable Flexibility in Sentencing Decisions.*—The *Coefield-Kaylor* approach to the YCA is also vulnerable with respect to its implicit premises regarding the desirability of YCA treatment for youth offenders. In regarding YCA as giving a youth offender a "presumptive right" to treatment under the Act, the courts have apparently assumed that such treatment for up to six years (or longer under Section 5010(c)) will always be preferable to the offender than would sentencing under other applicable penalty provisions. That such an assumption is plainly unwarranted is demonstrated by the numerous cases in which youth offenders have sought to avoid such treatment.[25]

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the YCA in 1950. See *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 199–200. The young adult offender provision constitutes no more than an authorization of a new sentencing alternative and a general guideline, to be considered by district courts in the exercise of their broad sentencing discretion, reflecting the Congressional expectation that relatively fewer young adult offenders than youth offenders would be suitable candidates for rehabilitative treatment under the Act.

[25] *E.g.*, *United States* v. *Winer*, 459 F. 2d 975 (C.A. 5); *Harvin* v. *United States*, 445 F. 2d 675 (C.A.D.C.), certiorari denied, 404 U.S. 943; *Rogers* v. *United States*, 326 F. 2d 56 (C.A. 10). In many cases, both the actual sentence imposed and the maximum sentence will be less than the period of possible confinement as a youth offender. In the instant case, for example, petitioner was sentenced to ninety days' confinement and two years' probation, and was subject to a maximum sentence of one year (see 21 U.S.C. 844(a)), which could not without his consent be served in a penitentiary (18 U.S.C. 4083), whereas he might have been exposed to up to six years' confinement under the Act. Indeed, petitioner sought to have his guilty plea set aside on the ground, *inter alia*, that he had

The net result of the *Coefield-Kaylor* approach, moreover, is to limit unduly the traditionally broad discretion of sentencing judges. By straitjacketing judges in the exercise of their normal sentencing discretion, *Coefield* and *Kaylor* may disserve in several respects those offenders who are good candidates for rehabilitation. As the Act itself recognizes (18 U.S.C. 5012), prospects for rehabilitation depends greatly on the availability of adequate facilities to provide the type of treatment a particular offender needs for the period of time required to accomplish his rehabilitation. Yet, if the vast majority of offenders must now be committed for treatment, the result, particularly in a jurisdiction like the District of Columbia, is likely to be overcrowding of facilities, commingling of those likely to be rehabilitated with relatively hard-core criminals, and premature release of offenders before their treatment has had an opportunity to be effective.[26]

In addition, if any youth offender who might derive some benefit from YCA treatment must be committed

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not been informed of the possibility of commitment for up to six years under the YCA (A. 17–18).

In *United States* v. *Winer*, *supra*, a youth offender convicted of the same offense as petitioner contended unsuccessfully that the trial court committed a gross abuse of discretion in sentencing him for treatment under Section 5010(b).

[26] The United States District Court for the District of Columbia has ordered the opening of a new youth corrections center for the District for defendants sentenced under the Act, reflecting the court's concern that, due to overcrowding, youth offenders sentenced for such crimes as homicide, rape and robbery were, in 1971, serving on the average no more than ten months before parole, compared to thirty-two months in 1967. *United States* v. *Alsbrook*, 336 F. Supp. 973, 977 (D.D.C.).

for such treatment many offenders who would benefit from YCA treatment, but who the judge believes would derive more benefit from different sentencing, would be denied the benefit of such other disposition. For example, the *Coefield-Kaylor* approach, in requiring a court to sentence a youth offender to probation or treatment under the Act unless he is incorrigible, might preclude the court from extending to an offender in petitioner's position the advantages of a special probation provision that would appear to be more desirable from the offender's standpoint than any of the alternatives available under the YCA, simply because the offender was not incorrigible or might be able to derive some benefit from YCA treatment.[27]

Similarly, the judge may conclude that, while an offender might "derive benefit" from indeterminate commitment for treatment under the YCA, the needs of justice and the interests of the offender are best served by imposing a split sentence involving a short

[27] Thus, upon convicting a defendant under 21 U.S.C. 844 (which petitioner was convicted of violating), the court is authorized to place a first time offender on probation for up to one year and, without entering a judgment of conviction, to defer further proceedings. If the defendant does not violate any of the terms of his probation, he is entitled, upon expiration of the period of probation, to be discharged and to have the proceedings dismissed, without court adjudication of guilt, such discharge or dismissal not to be deemed a conviction for any purpose. 21 U.S.C. 844(b)(1). Moreover, if the defendant was not over 21 at the time of the offense, he is entitled, upon such dismissal and discharge, to an order completely expunging the prior proceedings. 21 U.S.C. 844(b)(2). The one-year limit on probation and the mandatory expungement and related procedural protections make probation under Section 844 more desirable even than YCA probation.

period of confinement (*e.g.*, a few weeks or months) followed by probation (see 18 U.S.C. 3651), without subjecting the offender to the risk of commitment for up to six years.[28] This is essentially what was done in the instant case, but it could not be done under the YCA because the judge has no control over the timing of release—a difficulty which some judges have noted. See Frankel, *Criminal Sentences* 117–118 (1972).

Finally, we submit that the exclusive focus on rehabilitation reflected in the recent decisions of the District of Columbia Circuit improperly forecloses consideration of other, important sentencing objectives—a result never intended by Congress in enacting the YCA. This aspect of the issues surrounding YCA sentencing is candidly discussed in a recent opinion by Chief Judge Greene of the District of Columbia Superior Court in *United States* v. *Cambrell,* Crim. No. 33551–73.[29] Judge Greene was there called upon to sentence a 21 year old defendant who had been charged with a series of brutal crimes including murder, rape, and assault, and had pled guilty to first degree murder. Judge Greene was unable to conclude from presentence studies that the defendant was totally incorrigible, and he could not predict with assurance that exposure to concentrated treatment over an extended period of time would not produce some rehabilitative "benefit." On the other hand, it appeared at least equally likely that the defendant's

[28] For other sentencing alternatives that might be similarly, and undesirably, foreclosed by the *Coefield-Kaylor* approach, see p. 10, *supra*, n. 5.

[29] Copies of this unreported opinion are being lodged with the Clerk and served on opposing counsel.

violent antisocial tendencies would not be eliminated or materially reduced even by the best available treatment.

Judge Greene decided to impose an adult sentence on this offender. He reached this decision not because he could honestly conclude that the offender would "derive no benefit," as that expression has come to be understood under the decisions of the District of Columbia Circuit, but because he concluded that existing facilities for youth offenders are in fact unlikely to produce substantial rehabilitation during the relatively short probable period of custody even under a Section 5010(c) commitment (currently averaging less than two years even for serious offenders). Judge Greene was not prepared to countenance the probable premature release of this offender at a time when he would likely be a continuing danger to society, nor was he willing in such a case to disregard the interests of society in deterrence and punishment of wrongdoing. We seriously doubt that Congress intended by the manner of its drafting of Section 5010(d) to preclude such a result.

If the Court were to conclude that the Act imposes a mandatory preference for sentencing under Section 5010 (b) or (c) for all youth offenders who might derive some benefit from YCA treatment, then it may be appropriate to remand for resentencing in the instant case, because it seems clear that the district court did not consider itself bound by any such standard in sentencing petitioner (A. 45). In that event the Court need not reach in this case the issues concerning explicit findings, statements of reasons and

appellate review. Those issues will, however, be presented by our petition for certiorari in *Kaylor*.[30]

If, as we contend, the YCA constitutes essentially an alternative sentencing mode to be considered and applied in the traditional sentencing discretion of the trial judge, such a remand would not appear necessary, because it is undisputed here that the district court did consider the Act and determine, albeit implicitly (A. 6, 11–13, 44–45), that YCA treatment would be inappropriate in this case. In that event, it would be necessary for the Court to address the procedural questions raised by the petition, which we consider below.

B. THE ACT DOES NOT ALTER TRADITIONAL SENTENCING PROCEDURES, UNDER WHICH SENTENCES NEED NOT BE ACCOMPANIED BY EXPLICIT FINDINGS OR STATEMENTS OF REASONS AND ARE NOT SUBJECT TO APPELLATE REVIEW

The provisions of the YCA and its pertinent history reveal that Congress was concerned about providing federal judges with added authority and facilities that could be used particularly for the rehabilitation of certain offenders. Except for supplying judges with an additional discretionary tool for obtaining information about a youth offender in advance

[30] In view of the provision of 18 U.S.C. 5023(a) that nothing in the YCA shall affect the provisions of chapter 231 of Title 18, it is arguable that whatever substantive or procedural requirements might otherwise apply in the sentencing of youth offenders do not apply when the offender is sentenced, as petitioner was, to probation, or a split sentence involving probation, pursuant to 18 U.S.C. 3651, which is part of chapter 231. Cf. *Cherry* v. *United States*, 299 F. 2d 325, 326 (C.A. 9). We have not, however, relied upon this argument in the lower courts, and we do not rely upon it in this Court.

of sentencing (18 U.S.C. 5010(e)), nothing in the Act or its history evidences any intention to alter existing sentencing procedures.

That the Act was not meant to impose new procedural requirements is strongly suggested by YCA sentencing practices in the federal courts during the Act's first twenty years. Thus, it has not been the practice of federal judges over the years to make explicit findings whenever youth offenders have been sentenced under other applicable penalty provisions.[21] Cf. *United States* v. *Kaylor, supra,* slip op. at 5713, 5714. Nor has it been the routine practice of federal judges to accompany sentences to youth offenders under provisions other than the YCA with a statement of reasons for not imposing treatment under the Act. Finally, not until *Coefield* had it been held that the exercise of a judge's discretion in sentencing a youth offender under other applicable penalty provisions was subject to appellate review on the merits.[22]

In *Coefield,* as a direct consequence of its conclusion that the YCA imposes a substantive standard on sentencing judges requiring sentencing under the Act absent an affirmative finding that the defendant will

[21] See, *e.g.*, Carter & Kunzel, *Forms of Adjudication For Use in Sentencing*, 44 F.R.D. 197, 203, 213 (1968 rev.), which contains no requirement for an explicit finding when a youth offender is sentenced as an adult.

[22] In *Rogers* v. *United States*, 326 F. 2d 56 (C.A. 10), the court remanded for resentencing on the defendant's appeal because the record did not affirmatively show a "jurisdictional" fact required to authorize the sentence imposed under the YCA, *i.e.*, that the defendant was under 22 and that the offense was one for which imprisonment could be imposed. See also *United States* v. *Critchlow*, 459 F. 2d 793 (C.A. 10).

not "derive benefit" from YCA treatment, the District of Columbia Circuit held that three procedural requirements must also be satisfied: (1) It held that Section 5010(d) requires an *explicit* finding that the defendant will not derive benefit from treatment (476 F. 2d at 1156);[33] (2) it further required that such a "no benefit" finding be accompanied by a statement of reasons (*id.* at 1157);[34] and (3) it concluded that such reasons are subject to appellate review to determine whether the finding of "no benefit" is consistent with the purposes of the Act (*id.* at 1158–1159).[35] Accord, *United States* v. *Reed*, 476 F. 2d 1145 (C.A.D.C.). In *Kaylor*, the Second Circuit recently adopted all of the

[33] In *United States* v. *Waters*, *supra*, the court had said that Section 5010(d) requires that the sentencing judge "affirmatively find," either "explicitly or implicitly," that a youth offender will not derive benefit from treatment under Section 5010(b) or (c) before sentencing under other applicable provisions. 437 F. 2d at 724, 725. Believing that comments by the sentencing judge were inconsistent with such a finding, the court of appeals in *Waters* had been unwilling to assume that the appropriate finding was implicit in the sentencing of the defendant as an adult on his conviction for robbery and assault with a deadly weapon, and therefore remanded for resentencing. Accord, *United States* v. *Ward*, 454 F. 2d 992 (C.A.D.C.).

[34] The court said that where the district court requests additional information from the Youth Division pursuant to Section 5010(e) as to whether a youth offender will derive benefit from treatment under the Act, and then follows the Youth Division's recommendation in imposing sentence, additional reasons may, but need not, be stated. Reasons must be stated where such recommendation is not followed (*e.g.*, *United States* v. *Reed*, 476 F. 2d 1145, 1151 (C.A.D.C.)), or where information is not sought pursuant to Section 5010(e). 476 F. 2d at 1157.

[35] In *Coefield* the district court had made no explicit finding or statement of reasons before sentencing the defendant as an adult on his robbery conviction (he was already serving an

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*Coefield* procedural requirements, but only on a prospective basis (slip op. at 5713–5714).[36]

Thus far, only the Second Circuit has followed the District of Columbia Circuit's revolutionary interpretation of the YCA. Other appellate courts have disagreed with the requirement of an explicit finding of "no benefit" in every case where the youth offender is sentenced under other applicable penalty provisions (and, accordingly, have not required a statement of reasons in every case), although some courts have required a finding in particular cases.[37] These other

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adult sentence for a prior robbery conviction), and the court of appeals remanded for further sentencing proceedings.

In the companion case of *United States* v. *Reed*, 476 F. 2d 1145 (C.A.D.C.) (*en banc*), the court acknowledged that "[t]he Youth Corrections Act does not * * * contemplate wholesale appellate intrusion" into the sentencing process (*id.* at 1150), and said that an appellate court can be concerned only with the "rationality," in relation to the congressional objectives, of the factors identified on the record as justifying the sentencing judge's decision. *Ibid.* The results in subsequent cases, however, reveal how evanescent such a limitation on scope of review can be in practice. See, *e.g.*, pp. 56–57, *infra*.

[36] In *United States* v. *Toy*, 482 F. 2d 741, 744 (C.A.D.C.), the court held that the *Coefield* requirements of an explicit finding and a statement of reasons apply also to the determination under Section 5010(c) that a youth offender "may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction * * *." This holding seems logically compelled by the precedents in the District of Columbia Circuit.

[37] In addition to the court of appeals in the instant case, decisions holding that an explicit finding is not required include *United States* v. *Crapps* (*sub nom. United States* v. *Bamberger*), 456 F. 2d 1119, 1128–1129, n. 7 (C.A. 3); *United States* v. *Jarratt*, 471 F. 2d 226, 230 (C.A. 9), certiorari denied, 411 U.S. 969. But see *Williams* v. *United States*, 476 F. 2d 970, 972, n. 5 (C.A. 3), where a different panel, without reference to

courts, moreover, have apparently not accepted the premise of *Coefield* and *Kaylor* that the YCA imposes a preferential ordering of sentencing options for trial judges, which may be applied with only limited discretion. But see p. 28, *supra*, n. 19.

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*Bamberger*, indicated that an explicit finding of "no benefit" should be made, but held that reasons need not be stated. In *Jarratt*, since the defendant had simply been placed on probation, it was unclear whether he had been sentenced as a youth offender or as an adult, and because the case was being remanded for resentencing for other reasons, the court of appeals directed the district court to clarify its determination by making an express finding of "no benefit" from treatment under Section 5010 (b) or (c) if the adult sentencing provisions were meant to govern. 471 F. 2d at 229.

The Fourth Circuit has also stated that the finding of Section 5010(d) may ordinarily be implied from the sentencing of a youth offender under provisions other than Section 5010 (b) or (c). *Cox* v. *United States*, 473 F. 2d 334, 337 (C.A. 4), certiorari denied, 414 U.S. 869. In that case however, the Fourth Circuit remanded for resentencing because the trial judge had specifically stated that he had not made a finding of "no benefit" before sentencing the defendant as an adult, and the court of appeals called for an explicit finding and statement of reasons on the remand. *Id.* at 337. In *United States* v. *Underwood*, No. 72-1207 (C.A. 4), decided December 18, 1973, a panel affirmed an adult sentence after a case had been remanded for a specific finding of "no benefit." The district court apparently accompanied the finding with a statement of reasons, but the court of appeals' opinion does not say that such a statement is essential.

The First Circuit has remanded for a finding under Section 5010(d) where the defendant was sentenced as an adult but the sentencing judge would have imposed youth offender treatment had he not believed that the defendant was legally ineligible for it. *United States* v. *MacDonald*, 455 F. 2d 1259 (C.A. 1), certiorari denied, 406 U.S. 962. Although the court did not hold that an explicit finding was always required, it cited *United States* v. *Waters*, *supra*, which held that the finding could be made "explicitly or implicitly." See also *United States* v. *Walker*, 469 F. 2d 1377, 1381 n. 4 (C.A. 1), where the court

(Continued)

Nor have other appellate courts deemed themselves authorized to engage in substantive review of the merits of the decision of a sentencing judge not to use the Act, and such review has been explicitly rejected by the District of Columbia Court of Appeals, which now has jurisdiction over most local criminal cases in the District. See *Reed* v. *United States*, 312 A. 2d 775, 781.

1. *The Act Does Not Require the Making of Explicit "No Benefit" Findings.*—The *Coefield* and *Kaylor* holding that the "finding" referred to in Section 5010(d) must be explicit is not—and was not said to be—compelled by the language of the Act or its rele-

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(Continued)

rejected a claim that the sentence should be set aside because a finding under Section 5010(d) was not made.

The Fifth Circuit, faced with a claim that a finding of "no benefit" had not been made, remanded the case to the district court so that the Section 5010(d) finding could be made. *United States* v. *Schenker*, 486 F. 2d 318 (C.A. 5). The court's brief *per curiam* decision did not indicate, however, whether an explicit finding was always necessary or whether the particular facts in that case gave rise to doubts as to whether such a finding could be regarded as implicit in the defendant's sentence. In *United States* v. *Fonseca*, No. 73-2875 (C.A. 5), decided March 6, 1974, the court held that "[t]here was no error" in the trial court's failure to make an explicit finding under Section 5010(d) because the court's comments at the time of sentencing "were tantamount to a finding" that the defendant would not derive benefit from a YCA sentence. Slip op. at 1458–1459. The court added that "[w]hether the trial judge must make such findings is an open question." *Ibid.* The Fifth Circuit is presently considering Section 5010(d) in *Hoyt* v. *United States*, No. 73-2435 (C.A. 5).

The District of Columbia Court of Appeals, after initially following *Coefield* as to the need for an explicit finding and a statement of reasons, in order to avoid a split in the jurisdiction and in deference to the holdings of the federal circuit courts in

vant history. In *Coefield,* the court simply concluded that, without an explicit finding, "it cannot be said with certainty that the Act was considered and a negative finding with respect to its possible benefits was made." 476 F. 2d at 1156. In *Kaylor*, the court noted as an additional reason for requiring an express finding that reliance upon an implicit finding might lead to unmeritorious appeals. Slip op. at 5711–5712.

In fact, neither the language of the Act nor its history suggests that a judge's determination to sentence an offender under other applicable provisions requires an explicit "finding" that the offender will not derive benefit from treatment under the Act. Viewed in context and against the background of the legislative history, the language of Section 5010(d) to the effect that certain things may be done if the court "finds" specified matters, is not equivalent to a statutory command that the court make findings in the manner of an administrative agency whose actions are subject to judicial review. Even where a court or agency is required to "find" a particular matter as a prerequisite to certain action, that often means, as here, only that it "conclude" in the manner specified, and does not mean that an explicit, articulated finding is necessary.[38]

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interpreting statutes of national application (see *Reed* v. *United States*, 312 A. 2d 775, 779; *Small* v. *United States*, 304 A. 2d 641), has recently modified its position so that, in cases where the sentencing judge follows the recommendation in a Section 5010(e) report that the defendant be sentenced as an adult, an explicit finding of "no benefit" by the court is not essential. *Reed* v. *United States*, *supra*, 312 A. 2d at 779.

[38] Statutes requiring a finding as a prerequisite to important governmental action do not ordinarily require explicit findings and stated reasons (see *Citizens to Preserve Overton Park, Inc.*

(Continued)

To the extent that Section 5010(d) does require a particular "finding" before the judge sentences under other applicable provisions, one may deem such a finding implicit in a sentence under such otherwise applicable provisions, relying upon the presumption of regularity that applies to actions of courts no less than to those of other government officials. See, *e.g., United States ex rel. Travis* v. *Travis,* 319 F. Supp. 380, 381 (S.D. W. Va.); cf. *United States* v. *Chemical Foundation, Inc.,* 272 U.S. 1, 14–15. It is especially appropriate to rely upon an implied finding in cases where, as here, an experienced trial judge was specifically referred to the Act, either by counsel or by the presentence report, prior to pronouncing sentence.

While we thus do not believe that the Act itself requires an explicit finding under 5010(d), we recognize that there are reasons favoring some type of procedural requirement to indicate that the potential application of the YCA has been considered. We believe that such a clear, specific, and limited requirement for an express finding may properly be imposed under the power of this Court and the courts of appeals to supervise and facilitate the administra-

(Continued.)
v. *Volpe*, 401 U.S. 402, 409, 417) and may be satisfied by an unrecorded "mental" finding. *E.g., D.C. Federation of Civic Associations, Inc.* v. *Volpe*, 459 F. 2d 1231, 1237, 1240–1241 (C.A. D.C.), certiorari denied, 405 U.S. 1030. See also *Interpace Corp.* v. *City of Philadelphia*, 438 F. 2d 401, 404 (C.A. 3) (reference to "finding[s]" by court in Rule 23(b)(3), Fed. R. Civ. P., does not require "express, objective articulation" of required determination concerning class action); *State ex rel. Iowa Natl. Mut. Ins. Co.* v. *Florida Industrial Commission*, 151 So. 2d 636, 639 (Fla. Sup. Ct.); *School Dist. No. 7* v. *Weissenfluh*, 236 Ore. 165, 169–170, 387 P. 2d 567, 569 (*en banc*).

tion of justice in the federal courts, and we do not oppose such a result.[39] Such a requirement tends to ensure that the sentencing judge has deliberately rejected the alternative of sentencing under the YCA and also, as suggested in *Kaylor,* may remove a basis for unmeritorious appeals. While we do not oppose such a requirement, we note that some courts have suggested reasons why an explicit finding that an offender "will not derive benefit from treatment" may be undesirable.[40]

2. *The Act Does Not Permit Appellate Courts to Require a Statement of Reasons.*—The *Coefield-*

[39] We do not mean to suggest a requirement of an explicit formal "finding" in every case where an offender is sentenced under Section 5010(d), as proposed by petitioner and *Amici.* Rather, we have in mind a flexible requirement which could be satisfied by oral statements at sentencing, by recitals in the judgment, or perhaps by other means.

[40] In *Reed v. United States*, *supra*, 312 A. 2d at 779–780, n. 8, the court noted that "the giving of an adult sentence constitutes an implicit finding that the chances of successfully rehabilitating a defendant are relatively poor. For the trial judge to say so expressly while pronouncing sentence would, in all likelihood even further reduce the prospects for rehabilitation." That is to be avoided because "rehabilitation is a continuing goal of all correctional institutions; a trial judge does not turn his back on the hope or possibility of rehabilitation by giving an adult sentence." *Id.* at 781, n. 10.

See also *United States* v. *Cambrell*, *supra*, where Chief Judge Greene noted that to tie the exercise of judicial discretion over sentencing of youth offenders to an explicit "no benefit" finding might undermine the integrity and credibility of the judicial process by forcing other elements considered in sentencing to be "integrated *sub silentio* into a lack-of-benefit-to-the-defendant conclusion." Slip op. at 18. Judge Greene's dilemma would be largely alleviated by a recognition of the substantive flexibility of the "no benefit" concept, for which we argue in Part II(A), *supra.*

*Kaylor* requirement of a statement of reasons to support a "no benefit" finding is erroneous. It finds no support in the language of the Act or its history. In *Coefield,* stated reasons were said to be "essential to a knowledgeable administration of the Act as intended by Congress" (476 F. 2d at 1157), in order to manifest the judge's awareness of the Act's applicability and the scope of his discretion, and to show that the judge has been informed of and considered the pertinent facts concerning the defendant and has related them to the applicable law. *Id.* at 1157–1158. In *Kaylor,* the court agreed with this rationale and added that a statement of reasons is required to enable the court of appeals to review the sentencing judge's action. Slip op. at 5714–5716.[41]

Not only do the language of the YCA and its legislative history not require any such statement of reasons, that history—particularly the original proposal in 1943—strongly indicates the YCA was not intended to embody any such requirement. See pp. 25–26, *supra.* Certainly, a mandatory statement of reasons would have been contrary to the well-established practice at the time of enactment of the YCA under which federal judges were not normally required to state rea-

[41] Neither court considered, however, the possibility that, if such a statement of reasons was "essential," it would have been required by Congress, as it has done elsewhere (see p. 51, *infra*) and as it considered in connection with an aspect of adult sentencing provisions in the 1943 predecessor to the YCA (see pp. 25–26, *supra*); nor did they recognize that such reasons would not be "essential" if, as we believe, it was Congress' intention merely to provide an additional sentencing alternative to be used in the judge's discretion, the exercise of which was not to be subject to appellate review.

sons for their sentences,[42] just as they are not routinely required to state reasons for many other determinations and findings [43]—such a novel requirement would almost certainly not have been imposed *sub silentio*. To the contrary, when Congress has intended to require a statement of reasons for a sentence, it has done so explicitly. Thus, in provisions for the sentencing of dangerous special offenders (18 U.S.C. 3575–3576) and dangerous special narcotics offenders (21 U.S.C. 849), Congress has expressly provided in meticulous detail for findings and reasons for such sentences (and for appellate review thereof).

There are, moreover, substantial policy reasons, relating to the unique nature of the sentencing process, which weigh against a requirement of a statement of reasons by the sentencing judge. The sentencing process is not simply a matter of ascertaining certain objectively demonstrable facts. Rather, sentences "turn on a discretionary assessment of a multiplicity of imponderables entailing primarily what a man is and what he may become rather than simply what he has done." Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process,* 45 Minn. L. Rev.

[42] Several months before the 81st Congress began its consideration of the YCA, this Court reaffirmed in broad terms the traditional flexibility and discretion of sentencing judges. See *Williams* v. *New York*, 337 U.S. 241.

[43] Courts need not ordinarily state reasons for their decisions, unless specifically required to do so by statute or rule. See Rule 52(a), Fed. R. Civ. P., which provides, with specified exceptions, that findings of fact on decisions of motions are unnecessary. See also *Taylor* v. *McKeithen*, 407 U.S. 191, 194, n. 4; *id.* at 195–196 (Rehnquist, J., dissenting). See also *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 917–918 (Frankfurter, J.) (discussing this Court's practice of exercising its certiorari jurisdiction without a statement of reasons).

803, 812–813 (1961). See also *Williams* v. *New York, supra,* 337 U.S. at 248–249, n. 13. Sentencing is a "predictive and discretionary" function. Cf. *Morrissey* v. *Brewer,* 408 U.S. 471, 480. For these reasons, a sentencing judge has always been empowered to exercise wide discretion regarding the sources and types of information he may utilize to assist him in determining the kind and extent of punishment to be imposed within the limits fixed by law. *Williams* v. *New York, supra,* 337 U.S. at 246. See also Rule 32, Fed. R. Crim. P."

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" Recognizing the need of a sentencing judge to consider factors not otherwise admissible, this Court said in *Williams* v. *New York, supra,* 337 U.S. at 247, 250:

"A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

* * * * *

"We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues."

See also *Williams* v. *Oklahoma,* 358 U.S. 576, 585.

Another reason for not requiring articulation of the factors and reasons underlying a sentence was explained by the President's Commission on Law Enforcement and Administration of Justice in the Commission's report, *The Challenge of Crime in a Free Society* (1967):

> In many cases information clearly could be disclosed without substantial likelihood of harm; yet there can be circumstances in which the particularly confidential nature of the source of the information may preclude its disclosure, or in which disclosure of a statement would be harmful to rehabilitation. Presentence reports sometimes rely upon the records of social, welfare, and juvenile agencies that are required to keep their records confidential; such agencies might stop providing information if disclosure were compelled. In other cases the person who provided certain information might be easily identified by the offender and, if the information is unfavorable, that person might be endangered. * * * [*Id.* at 144.][45]

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[45] Other reasons for not requiring a statement of reasons are indicated by the comments of District Judge Stanley A. Weigel, in testifying in opposition to a provision of a bill that would have required judges generally to state their reasons for sentences imposed:

"Most judges do state their reasons during the sentencing procedure. To require a statement of reasons would, in at least some cases, I fear, focus concern on making a record rather than on matters of more solid substance. Finally, it seems to me that often plausible reasons can be adduced to support wrong action and that, conversely, right action can be muddied by or questioned on the basis of adducing infelicitous reasons in its support.

* * * * *

(Continued)

3. *Requirements of Express Findings and Statements of Reasons Cannot Be Justified as Necessary for Facilitation of Appellate Review.*"—Appellate review of youth offender sentencing was based, in *Coefield*, not on any provision of the Act or its history, but on the court's conclusion that review is permissible "to determine whether the sentencing process has conformed with the standards set forth" by the decisions of the court. 476 F. 2d at 1158. *Kaylor* adopted the same conclusion. Slip op. at 5717. Once

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(Continued)

"It tends to turn the emphasis from what is done to rationalizing why it is done. And I think it may impede, gentlemen, another important thing in the whole process of sentencing.

"Every Federal judge that I know really studies hard and long on the matter of what the sentence shall be for the individual before him and just how it shall be imposed.

"Sometimes the therapeutic effect that the judge, based upon his knowledge of the defendant, intends that the sentence shall have may be destroyed if a reason is given. Sometimes the quiet imposition of a sentence, without any talk or lecture or explanation, may be much more useful to a defendant in terms of possible rehabilitation than a reasoning it out or a giving of reasons. Sometimes a statement of all the reasons which may underlie the judge's determination of what he thinks is the proper sentence may undermine the effect the judge intends the sentencing procedure to have." [Hearings on Appellate Review of Sentencing Before the Subcommittee on Improvements in the Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., at pp. 78–79.]

" The question of appellate review of the correctness of the court's decision to sentence petitioner under applicable penalty provisions other than the YCA has not been raised by the petition and is not directly before the Court in this case. That issue, however, is closely related to the questions which are raised as to the need for explicit findings and a statement of

again, neither court considered the likelihood that if, contrary to long-standing tradition,[47] Congress had intended sentencing of youth offenders to be reviewable, it would have so provided, as it has done in other circumstances. See p. 51, *supra*. Moreover, as appellate

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reasons, in that the argument in favor of such findings and reasons is obviously stronger if there is to be appellate review of the sentencing determination as authorized by *Coefield* and *Kaylor*. But see *United States* v. *Velazquez*, 482 F. 2d 139, 142 (C.A. 2), encouraging district courts voluntarily to state reasons for sentences even though the sentence is not subject to appellate review.

It should be emphasized, moreover, that in discussing appellate review we are referring to review of the correctness of the district court's determination (for example, that a youth offender will not derive benefit from YCA treatment). The narrow scope of review available to challenge on appeal the legal sufficiency and procedural adequacy of imposition of adult sentences (see, *e.g.*, *United States* v. *Tucker*, 404 U.S. 443) is equally available to youth offenders. For example, an appellate court may require resentencing if it should appear that the district court had utterly failed to exercise its discretion in imposing sentence in a particular case by following a mechanical policy of sentencing all defendants convicted of certain offenses to the maximum possible sentence, regardless of individual circumstances. See, *e.g.*, *United States* v. *Hartford, et al.*, No. 73–1704 (C.A. 5), decided February 15, 1974.

[47] When the YCA was enacted, it was well-established that there was no appellate review of sentencing in the federal system. Thus, it was observed shortly after the Act was passed, that some "sixty years of undeviating federal precedents" established that appellate courts could not review sentencing determinations where the sentence was within the limits specified by law for the offense for which the defendant was convicted. *United States* v. *Rosenberg*, 195 F. 2d 583, 604, certiorari denied, 344 U.S. 838; see also *United States* v. *Tucker*, *supra*, 401 U.S. at 446; *Gore* v. *United States*, 357 U.S. 386, 393.

judges have acknowledged, the usual function of judicial review is not readily transferable to the type of discretionary, predictive judgment involved in sentencing.[48]

In practice, the scope of appellate review of sentencing under *Coefield* has been extensive (*e.g.*, *United States* v. *Phillips, supra;*[49] *United States* v. *Tillman,* No. 71–1352 (C.A.D.C.), decided June 6, 1973, vacated and rehearing *en banc* granted, August 10, 1973;[50]

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[48] Thus, one appellate judge has candidly admitted that "[a]s an appellate judge I have had no special expertise in sentencing. As a matter of fact I have never faced personally the frustrations of sentencing a convicted defendant. In that sense any suggestions I would have would be akin to those of a spinster on child bearing." Bazelon, *Opening Remarks, Institute on Sentencing*, 54 F.R.D. 285, 287 (1968).

[49] In *Phillips* the court reversed a youth offender's sentence as an adult upon conviction for robbery, which had been recommended by a Section 5010(e) report, and remanded for resentencing, because the panel disagreed that some factors referred to in the report (*e.g.*, the commission of another crime while on Youth Act probation) indicated that the defendant would not benefit from treatment under the Act. The panel held that there must be an explicit finding of "no benefit" by the court even when it follows the recommendation of a Section 5010(e) report.

[50] In *Tillman* a youth offender's sentence as an adult upon conviction for first degree murder was set aside and remanded for reconsideration because the panel majority disagreed with some of the reasons referred to in the Section 5010(e) report followed by the sentencing judge (*e.g.*, the defendant's "assaultive" personality, long criminal record, and failure to respond to juvenile court treatment for prior offenses). The factors cited in the report were held to be insufficient to overcome the defendant's "presumptive right" to treatment under Section 5010(b) or (c). Slip op. at 20.

*United States* v. *Riley*, 481 F. 2d 1127 (C.A.D.C.))[51] with the result that the court of appeals seems ultimately to be in fact substituting its judgment for that of the sentencing judge. Indeed, as Chief Judge Reilly recently observed in *Reed* v. *United States, supra*, in holding that "nothing in either the Act or its legislative history * * * indicates that such discretionary action is a matter for appellate review" (312 A. 2d at 781):

> [T]he net effect of the *Phillips*, *Riley*, and *Tillman* holdings is to prevent such judge from ever exercising his authority not to commit for youth correction treatment unless he or the authors of the advisory report set forth reasons which an appellate court finds acceptable [*id.* at 780].

In sum, the Youth Corrections Act does not impose the procedural requirements of the Administrative Procedure Act on sentencing judges. The elaborate structure of findings statements of reasons, and appellate review in connection with the sentencing of youth offenders amounts, in the final analysis, to judicial legislation to achieve results which may well be desirable but were plainly not intended by Congress when it enacted the YCA in 1950.

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[51] In *Riley*, a divided panel reversed a youth offender's sentence as an adult upon conviction for armed robbery, because the panel majority disagreed with the reasons stated in the Section 5010(e) report relied upon by the sentencing judge (including overcrowding of Youth Center facilities, and a pattern of "aggressive" robbery type offenses). See also *United States* v. *Forrest*, 482 F. 2d 777 (C.A.D.C.) (reasons stated by judge held insufficient.)

### III. CONSTITUTIONAL CONSIDERATIONS DO NOT REQUIRE THAT SECTION 5010(D) BE CONSTRUED AS IT HAS BEEN IN COEFIELD AND KAYLOR

Although the question presented in the petition was solely one of statutory construction,[52] and no constitutional question was raised,[53] petitioner now (Br. 10–15) seems to suggest that the decision of the court below is vulnerable under the Fifth Amendment. Under the circumstances, however, that issue is not properly before the Court. See, *e.g., Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 37, n. 35; *Irvine* v. *California,* 347 U.S. 128, 129–130; *Phillips Co.* v. *Dumas School Dist.,* 361 U.S. 376, 386, n. 12. The contention is in any event, without merit.

No court has held that explicit findings, a statement of reasons, or appellate review is required with respect to Section 5010(d) as a matter of due process of law; nor have the courts considered themselves obliged to construe Section 5010(d) in any particular manner to avoid constitutional issues. All of the decisions at variance with the decision below have rested on a purported construction of the Act itself, in light of its purposes and legislative history.

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[52] The "question presented" was said to be: "Does the Federal Youth Corrections Act compel sentencing courts to state reasons on the record why a youth offender would not receive benefit from treatment under the Act before sentencing the youth offender pursuant to the Adult Criminal Code" (Pet. 2).

[53] Indeed, no constitutional provision was even cited, in accordance with Rule 23(1)(d) of the Rules of this Court, as being involved in the case (Pet. 2).

This Court has held that due process does not require a sentencing judge to divulge the reasons for the sentence he imposes or require appellate review of the exercise of the discretionary power vested in him to fix sentences. *Williams* v. *Oklahoma, supra; Williams* v. *New York, supra; Blockburger* v. *United States,* 284 U.S. 299, 305; *Kawakita* v. *United States,* 190 F. 2d 506 (C.A. 9), affirmed, 343 U.S. 717, 745; see *Townsend* v. *Burke,* 334 U.S. 736, 741. Nor does it violate due process to vest in trial judges the discretionary authority to determine whether an offender should be rehabilitated through treatment particularly stressing that objective or sentenced under the penalty provisions otherwise applicable to his offense. See *Marshall* v. *United States,* No. 72–5881, decided January 9, 1974.[54]

In an effort to avoid the thrust of these decisions, petitioner's suggestion of a constitutional issue begins

[54] In *Marshall*, this Court said that "it would have been a permissible choice for Congress to permit discretionary inclusion in * * * [narcotic addict rehabilitation] programs of those whose prior offenses were determined to be addiction-related or motivated. Such a discretion might appropriately have been vested in the trial judge much in the manner in which he is now required to exercise his discretion under § 4252 in determining whether the defendant is an addict who is likely to be rehabilitated through treatment." Slip op. at 10. See also *United States* v. *Lee*, 478 F. 2d 1400 (C.A. 4), certiorari denied *per curiam*, No. 73–5256, November 19, 1973, in which the Fourth Circuit affirmed a trial judge's refusal to sentence an offender guilty of violating 21 U.S.C. 841(a)(1) to narcotic addict rehabilitation treatment under 18 U.S.C. 4251 *et seq.*, instead sentencing him to the penalty provisions otherwise applicable. Accord, *Hart* v. *United States*, No. 73–3139 (C.A. 5), decided January 28, 1974.

with the premise that every youth offender has a "valuable right" to be treated in accordance with the Act (Br. 10–11), and then contends that that right cannot be "destroyed" through sentencing as an adult without an articulation by the court of findings and reasons for the adult sentence.

As we have shown, however, even if we accept, *arguendo,* petitioner's debatable assumption that a defendant will always prefer to be sentenced as a youth offender than otherwise, neither the Act nor its legislative history supports the claim that a defendant has a "right" to such treatment. That is merely one of the options available in the exercise of the court's traditional discretion in sentencing.

However it is termed, a youth offender's expectation of possible treatment under the Act, in lieu of an adult sentence or other applicable penalty, is not such an interest that the demands of due process impose procedural requirements, not normally applicable to sentencing, upon the sentencing of youth offenders.

*Kent* v. *United States,* 383 U.S. 541, on which petitioner relies, is not to the contrary. There, this Court construed a different statute involving fundamentally different consequences. In that case the defendant—prior to trial or conviction—was entitled *prima facie* to treatment as a juvenile, and the exceptional provision for waiver by the juvenile court of its jurisdiction had substantial effects not only on possible treatment but also upon a whole array of important constitutional and other procedural rights concerning the

trial.[55] The determination to sentence a convicted youth offender as an adult does not involve a deprivation of rights comparable to the waiver of jurisdiction in *Kent*.[56]

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[55] That *Kent* rested upon construction of a particular statute, and not on constitutional grounds, is indicated by the decision in *Cox* v. *United States*, *supra*, where the court of appeals upheld the constitutionality of the provision of the Federal Juvenile Delinquency Act (18 U.S.C. 5032) giving the Attorney General unreviewable discretion to direct, without hearings, findings or reasons, that a juvenile be proceeded against as an adult rather than as a juvenile—a decision comparable in consequences to the court's waiver involved in *Kent*. See also *United States* v. *Verra*, 203 F. Supp. 87, 91 (S.D. N.Y.).

[56] Unlike a parolee, who has merely been *accused* of violation of the terms of parole, petitioner, having been *convicted* of a criminal offense, had no presumptive right to continued liberty. Compare *Morrissey* v. *Brewer*, 408 U.S. 471. If any analogy to parole is appropriate, petitioner is like a prisoner seeking release on parole. The prisoner enjoys no presently existing right to liberty, and the decision to allow release turns not on retrospective findings of fact so much as on, among other predictions, an assessment of the benefit the parole applicant and society will derive from his release. Due process requirements of findings and reviewable reasons have been held inapplicable to such discretionary judgments regarding the terms of incarceration. *E.g., Farries* v. *United States*, 484 F. 2d 948, 949 (C.A. 7); *Scarpa* v. *U.S. Board of Parole*, 477 F. 2d 278, 282–283 (C.A. 5) (*en banc*), certiorari granted and remanded for a determination of mootness, 414 U.S. 809, subsequently vacated as moot; *Menechino* v. *Oswald*, 430 F. 2d 403 (C.A. 2), certiorari denied, 400 U.S. 1023. Nor is this case comparable to *North Carolina* v. *Pearce*, 395 U.S. 711, involving the right not to have a heavier sentence imposed for having pursued an appeal. See also *Goldberg* v. *Kelly*, 397 U.S. 254, 262, dealing with possible loss of "a matter of statutory entitlement."

Petitioner's reliance upon *Specht* v. *Patterson*, 386 U.S. 605, is also misplaced. The sentencing of a youth offender does not entail an independent supplementary criminal proceeding comparable to that involved in *Specht*.[57] The necessary consideration of potential benefit from treatment under the Act is but one aspect of the appraisal of an offender's potential for rehabilitation that is part of the sentencing judge's exercise of discretion in any case, whether the choice is limited to various periods of imprisonment, or includes probation, suspension of sentence, or other dispositions.

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[57] In *Specht*, the Court held that due process required a full evidentiary hearing and reviewable reasons before a person convicted of a specified sex offense (having a maximum sentence of ten years) could be subjected to a special sentence of from one day to life, which could be imposed only if the sentencing court was of the opinion that the person "if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." Colo. Rev. Stat. § 39–19–1; see 386 U.S. at 607. That provision did not make "the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person actually constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact * * * that was not an ingredient of the offense charged." *Id.* at 608. The Court specifically reaffirmed its decision in *Williams* v. *New York*, *supra*, where it held that the due process clause did not impose procedural requirements on a sentencing judge, but found the sentencing process in *Specht* to present a "radically different situation." 386 U.S. at 606, 608.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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MICHAEL RODAK, JR.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

**No. 73-5284**

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DOUGLAS RAYMOND DORSEYNSKI,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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## REPLY BRIEF FOR AMICI CURIAE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

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DOUGLAS RAYMOND DORSZYNSKI,

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—v.—

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## REPLY BRIEF FOR AMICI CURIAE

1. In its brief to this Court, respondent persists in raising issues which are not properly presented for review. As to the issues which are presented, respondent makes two significant concessions, which should lead this Court, at a minimum, to vacate the sentence and remand this case for further consideration.

Respondent states:

> "If the Court were to conclude that the Act imposes a mandatory preference for sentencing under Section 5010(b) or (c) for all youth offenders who might derive some benefit from YCA treatment, then it may be appropriate to remand for resentencing in the instant case, because it seems clear that the district court did not consider itself bound by any such standard in sentencing petitioner (A. 45). *In that event the Court need not reach in this case the issues concerning explicit findings, statements of reasons and appellate review.*" (Brief for Respondent at 41) (emphasis supplied)

Respondent further states:

> "While we thus do not believe that the Act itself requires an explicit finding under 5010(d), we recognize that there are reasons favoring some type of procedural requirement to indicate that the potential application of the YCA has been considered. *We believe that such a clear, specific, and limited requirement for an express finding may properly be imposed under the power of this Court* and the courts of appeals to supervise and facilitate the administration of justice in the federal courts, *and we do not oppose such a result.*" (Id., at 48) (emphasis supplied)

Since the court below did not make an express finding and respondent does not oppose such a requirement, there is no remaining issue between the parties on this point, and the case should be remanded.

2. Because respondent has argued so many extraneous points, *amici* feel it necessary to reemphasize that this case does not raise the *substantive* question of what reasons are sufficient under Section 5010(d) of the F.Y.C.A. for refusal to sentence a youth offender to a youth corrections facility. There is no occasion here to define the "no-benefit" requirement, *i.e.*, to give definitive content to § 5010(d)'s language that before a judge may sentence a youth offender as an adult he must conclude that the offender "will not derive benefit from treatment under" the Act.

3. The sole issue in this case is what § 5010(d) *procedurally* requires when it says that, before a judge may sentence a youth offender as an adult, he "shall find" that the youth offender will not benefit from commitment to an F.Y.C.A. facility. Respondent's contention that the "Act does not purport to deal in any way with sentencing

procedures" (Brief for Respondent, at 13) cannot be reconciled with the statute's unambiguous mandate that the judge "shall find" "no benefit" before sentencing under § 5010(d). Respondent finds it impossible to explain away the *en banc* decisions of two circuits that the statute means exactly what it says and that an explicit finding must be made. It can only dismiss these holdings as an "overly-literal" reading of the statuté.

4. Respondent would have this Court read the "shall find" requirement out of § 5010(d). (*Id.* at 32-35) Respondent contends that, since the judge "may" sentence a youth offender under §§ 5010(a), (b), or (c), without any finding, he should be able to do the same under § 5010(d) simply because that provision also uses the word "may." (Id. at 34-35) This contention fails to take account of § 5010(d)'s unambiguous prerequisite that he "may" sentence under other provisions "if" he *"shall"* (as opposed to "may") make a finding of "no benefit." The contrast demonstrates Congress' intent that before a judge is empowered to act under § 5010(d), he must make an explicit rejection of the Act.

5. In its discussion of the legislative history of the F.Y.C.A., respondent continues to downgrade the findings and goals which animated the legislation and led Congress to make a striking break with past correctional practices for youth offenders. Instead, respondent simply quotes fragments from the legislative hearings to the effect that the F.Y.C.A. does not impair the power of the trial judge to sentence a youth offender under applicable adult provisions. (*Id.* at 15-26) As we have shown, however, (Brief of *Amici Curiae,* at 15) these statements only support the position that *amici,* petitioner, and re-

spondent all concur in, viz., the F.Y.C.A. does not *require* the sentencing judge to commit a youth offender to F.Y.C.A. facilities. These statements do not establish respondent's position that there need be no finding (or, alternatively, that the finding may, as a matter of statutory construction, be implicit and unsupported by reasons).

Respondent argues, however, that these statements gain force and meaning in the light of adult sentencing practices of the time, which did not, according to respondent, require explicit findings and statements of reasons before sentencing. Regardless of how one characterizes adult sentencing practices of the time, *amici* submit that the statements quoted by respondent should be read in light of the evolution of youth corrections legislation in the 1940's—legislation which was clearly intended to create new sentencing and correctional practices for youth offenders.

Both the American Law Institute's Youth Corrections Authority Act and the Judicial Conference's 1943 draft legislation—which were the precursors of the F.Y.C.A.—removed significant sentencing power *from the trial judge* and placed it in the hands of *an executive agency*. It was this displacement of sentencing power that troubled a few sitting District Judges. Accordingly, the provision of the 1943 draft legislation conferring sentencing power on a separate Youth Authority was dropped between the 1943 and 1949 versions.[1] By contrast, the "shall find"

[1] As noted in *Amici's* Brief to this Court, both the American Law Institute and the Judicial Conference drafted youth corrections legislation in the 1940's which formed the backdrop for the final version of the F.Y.C.A. *Amicus Curiae* Brief at 6-13. The sentencing provision of the American Law Institute model act *removed substantial power from sentencing judges* since for many

clause of § 5010(d) was, in *haec verba,* contained in the 1943 draft legislation; it did not draw any adverse comment from the judges who were polled about the proposed bill, and it remained in the statute unchanged.[2]

Thus, statements in the 1949 hearings that the bill did not reduce "the authority or interfere with the sentencing power of the judges" (Brief of Respondent, at 16), constituted reassurance that no sentencing power would be

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offenses it *required* the judge to send a youth offender to facilities administered by the Youth Correction Authority. American Law Institute, Youth Correction Authority Act §13 (1940). Two years later, the Judicial Conference draft act had modified the ALI position somewhat. In the draft submitted to the Congress, H. R. 2140, 78th Cong. 1st Sess. (1943), the sentencing judge retained the power to sentence a youth offender as an adult if "the court shall find that the youth offender will not derive benefit from treatment." Title III, §1(c). But under the 1943 Act *the judge's sentencing power was shared with correctional authorities* since the authorities could second-guess the judge and recommend that a youth originally sentenced as an adult be sentenced instead to youth act facilities. This recommendation took effect unless the judge took affirmative action in response to the correctional authorities' re-evaluation of the particular youth offender. Title II, §3.

[2] Respondent contends that the 1943 bill's requirement that reasons be given by a judge if he were going to override the correctional authorities sentence for an adult offender who was to serve over one year, H.R. 2140, *supra,* Title II, §1, demonstrates that the draftsmen of the Act did "where such was their intent, require explicitly some of the procedural measures that petitioner and *amici* contend are implicitly required by the Act." (Brief of Respondent, at 26, n. 18) This contention is illogical. It simply does not follow that there is an inconsistency between the "shall state his reasons" language of Title II, which related to adult sentencing and was dropped, and the "shall find" language of Title III, §1(c), which was retained. The former language arises in a context where a judge is to state his reasons for disagreeing with a conclusion about adult sentencing reached by the correctional authorities. The latter ("shall find") language applies to a judge's initial decision to sentence a youth offender either as an adult or to special youth facilities and the word "finding" is simply an inclusive word meant to cover both the conclusion (of "no-benefit") and the reasons for that conclusion.

withdrawn from the courts and given to the executive branch. These statements did not relate to the manner in which the sentencing power was to be exercised.[3]

6. The fact is that the legislative history is silent on the precise and narrow question before this Court: must the "no-benefit" finding required by § 5010(d) be explicit and supported by reasons? We have shown that such a finding is required by the language of the statute, and further, that the requirement of a finding supported by reasons is the necessary outgrowth of the structure and purposes of the F.Y.C.A. Respondent does not challenge *amici's* analysis of the framework and goals of the Act. Instead respondent constantly emphasizes that the procedural requirements at issue in this case are not found in adult sentencing practice. (Brief of Respondent, at 49-57) But it need hardly be emphasized that this case is not about sentencing practices under the adult criminal code but about sentencing practices under special legislation involving different goals, legislative findings and correction facilities and treatment capabilities for youth offenders. Accordingly, respondent's references to adult sentencing practices are inapposite.

We therefore respectfully urge this Court to hold that, before a judge may sentence a youth offender as an adult, he must state explicitly, with supporting reasons, that the

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[3] See Brief of Respondent, at 14:

> During a discussion of objections by federal judges to an earlier bill, Senator Kilgore, the sponsor of the YCA, similarly noted that two judges "objected to taking sentencing away from the court and giving it to an executive agency. But that has been answered in S. 2609 because it takes nothing away," to which another member of the Judicial Conference committee, Judge Orie L. Phillips, responded: "That is correct; it is purely optional." *Id.* at 69.

youth will not derive benefit from commitment to an F.Y.C.A. institution, to reverse the judgment of the court below, and to remand for reconsideration of sentence under the F.Y.C.A.

Respectfully submitted,

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

## Syllabus

## DORSZYNSKI *v.* UNITED STATES

### CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 73–5284. Argued March 20, 1974—Decided June 26, 1974

In sentencing a youth offender as an adult under other applicable penal statutes, § 5010 (d) of the Federal Youth Corrections Act requires a federal district court to "find" that the offender would not benefit from treatment under the Act, but does not require that such "finding" be accompanied by supporting reasons. Pp. 7–20.

(a) Section 5010 (d)'s requirement of a "no benefit" finding is not to be read as a substantive standard that must be satisfied to support a sentence outside the Act, for such a reading would not comport with the intent of the Act, as manifested by its legislative history, to increase federal trial judges' sentencing options, or with the traditional doctrine that the sentencing function is exclusively vested in the trial court and is not reviewable if within the terms of the statute. It therefore follows that requiring a statement of supporting reasons to accompany a "no benefit" finding would limit the trial court's sentencing discretion since it would only serve to facilitate appellate review of sentencing, contrary to the intent of the Act. Pp. 12–18.

(b) Section 5010 (d)'s "no benefit" finding requirement was designed to insure that the sentencing judge deliberately exercised discretion in choosing not to commit a youth offender to treatment under the Act, such a finding making it clear that the judge was not only aware of the Act's existence but also of the youth offender's eligibility for treatment thereunder. Once it is made clear that the judge has considered the option of the Act's treatment and rejected it, no appellate review is warranted. Pp. 18–19.

484 F. 2d 849, reversed and remanded.

## Syllabus

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, in which DOUGLAS, BRENNAN, and STEWART, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 73–5284

Douglas Dorszynski, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 26, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 414 U. S. 1091 (1973), to resolve a conflict in the circuits concerning whether, in sentencing a youth offender under other applicable penal statutes, subsection 5010 (d) of the Youth Corrections Act of 1950, 18 U. S. C. § 5005 *et seq.*, requires a federal district court first to make an explicit finding, supported by reasons on the record, that the offender would not benefit from treatment under subsections 5010 (b) or (c) of that Act. The Court of Appeals held that such a finding may be implied from the record, 484 F. 2d 849 (1973). Three circuits have taken that position,[1] and three circuits have required an explicit finding accompanied by supporting reasons.[2] We conclude that while an ex-

[1] *Williams* v. *United States*, 476 F. 2d 970 (CA3 1973); *Cox* v. *United States*, 473 F. 2d 334 (CA4 1973) (en banc); *Jarratt* v. *United States*, 471 2d 226 (CA9 1972), cert. denied, 411 U. S. 969 (1973); cf. *United States* v. *Walker*, 469 F. 2d 1377 (CA1 1972).

[2] *Brooks* v. *United States*, — F. 2d — (CA6, May 31, 1974) (No. 73–2195); *United States* v. *Kaylor*, 491 F. 2d 1133 (CA2 1974) (en banc); *United States* v. *Coefield*, — U. S. App. D. C. —, 476 F. 2d 1152 (1973) (en banc); cf. *United States* v. *Schenker*, 486 F. 2d 319 (CA5 1973) (en banc); see also *Small* v. *United States*, 304 A. 2d (DCCA 1973).

press finding of no benefit must be made on the record, the Act does not require that it be accompanied by supporting reasons. The judgment of the Court of Appeals is therefore reversed, and the case is remanded to the District Court for further proceedings.

## I

On October 19, 1971, a Special Agent of the Federal Bureau of Narcotics and Dangerous Drugs made arrangements with petitioner's co-defendant, whose case is not before this Court, to purchase approximately 1,000 tablets of Lysergic Acid Diethylamide (LSD) the following day. At the appointed hour on October 20, 1971, the undercover agent was shown approximately 1,000 LSD tablets in the possession of petitioner's co-defendant, who transferred the tablets to the agent. The exhibition and transfer took place in an automobile being driven by petitioner. After the tablets were transferred to the agent but before money had changed hands, petitioner and his co-defendant were arrested. The complaint upon which the arrest warrant for petitioner issued charged him with knowingly and intentionally possessing approximately 1,000 tablets of LSD, in violation of 18 U. S. C. § 2 and 21 U. S. C. § 844 (a).[3] Subsequent to petitioner's release on his own recognizance, his counsel informed the District Court that petitioner intended to plead guilty to the charge, and requested the completion of a pre-sentence report prior to the plea, as authorized by Fed. Rule Crim. Proc. 32 (c).

On February 14, 1972, proceedings were had in the

[3] 18 U. S. C. § 2 made petitioner punishable as a principal for any offense against the United States committed by his co-defendant. 18 U. S. C. § 844 (a) makes punishable the knowing or intentional possession of a controlled substance such as LSD when not obtained pursuant to a valid prescription or order, or as otherwise authorized by law.

District Court upon the filing of an information, arraignment, plea and sentence. The Government filed a one-count information charging petitioner and his co-defendant with a misdemeanor offense under 18 U. S. C. § 2 and 21 U. S. C. § 844 (a). The Government informed the court that the maximum sentence petitioner and his co-defendant, who were first offenders under § 844 (a), could receive was one year in prison, a fine of $5,000, or both; the court was also advised that since petitioner might have been under the age of 26, see n. 9, *infra*, he "may also be subject to the Federal Youth Corrections Act." [4] App., at 6. Petitioner, who was nineteen

[4] The sentencing provisions of the Act, 18 U. S. C. § 5010, are as follows:

"(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

"(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017 (c) of this chapter; or

"(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017 (d) of this chapter.

"(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

"(e) If the Court desires additional information as to whether a youth offender will derive benefit from treatment under subsections

years old at the time of the proceeding and had had no prior criminal record, pleaded guilty, as did his co-defendant. After inquiry as prescribed by Fed. Rule Crim. Proc. 11 to determine whether there was a basis in fact for petitioner's guilty plea, and whether it was entered voluntarily with understanding of its nature and consequences,[5] the District Court accepted the plea.

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(b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings."

The release of youth offenders committed under subsection 5010 is governed by 18 U. S. C. § 5017, which provides in part:

"(a) The Division may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Division.

"(b) The Division may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.

"(c) A youth offender committed under section 5010 (b) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

"(d) A youth offender committed under section 5010 (c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction."

[5] Although petitioner's complaint here is that he was *not* sentenced under the Act, following his conviction he challenged the validity of

Since petitioner desired to be sentenced at this proceeding, the District Court recessed to consider the presentence report, which petitioner's counsel had already read. After recess and before sentencing petitioner was given his right to allocution, and petitioner's counsel requested the court that petitioner "be placed . . . on probation under the Youth Corrections Act." App., at 13. See n. 4, *supra*. Petitioner then received a split sentence which remitted him to the custody of the Attorney General for one year, to serve 90 days' confinement "in a jail-type or treatment" institution, although the judgment mentions only a "jail-type" institution; the execution of the remainder of the sentence was suspended and petitioner was placed on probation for two years upon release from custody. 18 U. S. C. § 3651.[6] At no time during the proceeding, including

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his plea in part on the ground that he was not informed that under the Act he could have received a sentence of incarceration and supervision up to a period of six years, 18 U. S. C. §§ 5010 (b) and 5017 (c), see n. 4, *supra*, in asserted violation of Rule 11. The District Court denied relief on this ground; that ruling has not been challenged.

[6] There is no contention made that the District Court could not place petitioner on probation under 18 U. S. C. § 3651, as opposed to probation under the Act, 18 U. S. C. § 5010 (a). See *United States* v. *Kurzyna*, 485 F. 2d 517 (CA2 1973). Petitioner was released from confinement to probation on May 11, 1972, with the special condition that his probation terminate May 11, 1974. Although by now petitioner may have fully served his sentence, including probation, he still suffers the disabilities accompanying a criminal misdemeanor conviction under 18 U. S. C. § 844 (a). While the provision under which he was sentenced to probation, 18 U. S. C. § 3651, does not provide for relief from these disabilities, the Act does so in 18 U. S. C. § 5021, by its provision for setting aside the conviction of a youth offender:

"(a) Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and

sentencing, did the District Court make any reference to the federal Youth Corrections Act.

On May 1, 1972, after having filed numerous other post-conviction motions for relief, petitioner filed the motion at issue here, seeking relief pursuant to Fed. Rule Crim. Proc. 32 (d) and 35, and 28 U. S. C. § 2255, on two grounds. The first alleged that his guilty plea was not made understandingly; that issue is not before us. See n. 5, *supra*. The second alleged that the District Court was without jurisdiction to impose the sentence given because the court failed to make a finding that petitioner would not derive benefit from treatment under §§ 5010 (b) or (c), as assertedly required by § 5010 (d). See n. 4, *supra*. The District Court held an evidentiary hearing to consider this, as well as other motions, pending at that time. All were denied without opinion. The District Court stated at the post-

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the division shall issue to the youth offender a certificate to that effect.

"(b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation theretofore fixed by the court, which discharge shall automatically set aside the conviction, and the court shall issue to the youth offender a certificate to that effect.

Despite the expiration of petitioner's sentence, then, he may still receive the benefit of 18 U. S. C. § 5021 if he is resentenced under the Act. To be eligible to have his conviction set aside under the Act, petitioner would have to be committed under §§ 5010 (b) or (c), or placed on probation under §§ 5010 (a), and achieve the early discharge required by §§ 5021 (a) or (b). While this might require the imposition of a longer sentence than he originally received, petitioner represents through counsel that he would voluntarily seek resentencing which would place him back in probation. Tr. of Oral Arg., at 8, 16–18. The District Court would then be able, as a matter of discretion, to provide the requisite early unconditional discharge. 18 U. S. C. § 5021 (b).

conviction hearing that the Act did not require an affirmative finding that petitioner would not benefit from treatment thereunder before the court could sentence him under other applicable penalty provisions; the court concluded that in committing petitioner for one year under a split sentence "the [District] Court impliedly held that the Youth Corrections Act was not applicable." App., at 45.

The Court of Appeals affirmed, rejecting the view that trial judges must make an explicit finding that youth offenders would not benefit from treatment under the Act. The Court of Appeals held that such a determination may be implied from the record as a whole and that the imposition of the split sentence upon petitioner after his counsel had raised the possibility of sentencing under that Act satisfied subsection 5010 (d). 484 F. 2d, at 851.

## II

### *The Federal Youth Corrections Act*

The sole issue in this case is the validity of the sentence imposed by the District Court. Petitioner contends that before any adult sentence may be imposed subsection 5010 (d) requires first, that the sentencing judge find explicitly that the convicted defendant would receive no benefit from treatment under the Act and second, that the sentencing judge must explain the reasons for his finding. We begin with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.[7] *Gore* v. *United States*, 357

[7] There is no contention here that the District Court relied upon improper or inaccurate information. *United States v. Tucker*, 404 U. S. 443 (1972). Petitioner contends he was denied due process because he was deprived of his claimed right to be sentenced under the Act, without a reasoned explanation on the record for the asserted deprivation. We need not address this contention, for it was

U. S. 386, 393 (1958); *Townsend* v. *Burke*, 334 U. S. 736, 741 (1948); *Blockburger* v. *United States*, 284 U. S. 300, 305 (1932). Our task, therefore, is to determine whether the sentence imposed here was permitted under subsection 5010 (d) of the Act.

The federal Youth Corrections Act has been accurately described as the most comprehensive federal statute concerned with sentencing. *United States* v. *Coefield*, *supra*, n. 2, 476 F. 2d, at 1156. The Act is in substantial part an outgrowth of recommendations made by the Judicial Conference of the United States more than 30 years ago.[8] The principles and procedures contained in the Conference recommendations were in turn largely based on those developed since 1894 for a system of treatment of young offenders in England, known as the Borstal system. See Criminal Justice Act of 1948, 11 & 12 Geo. 6, c. 58, and Criminal Justice Act of 1961, 9 & 10 Eliz. 2, c. 39. Statistics available at the time of the Conference study revealed the two principal motivating factors behind the enactment of the Act: first, the period of life between 16 and 22 years of age was found to be the time

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not raised before the District Court, the Court of Appeals, or in the question presented in the petition for certiorari. *Phillips Co.* v. *Dumas School Dist.*, 361 U. S. 376, 386 n. 12 (1960); *Irvine* v. *California*, 347 U. S. 128, 129–130 (1954); *Radio Officers' Union* v. *NLRB*, 347 U. S. 17, 37 n. 35 (1954).

[8] In 1941 Chief Justice Stone requested the Judicial Conference to study the general subject of punishment for crime. The Chief Justice appointed four federal courts of appeals judges and three district judges to the committee which undertook the study. A subcommittee gave particular attention to the treatment of youth offenders. The committee made a report to the Judicial Conference in 1942, and developed a draft of an act to provide a correctional system for adult and youth offenders. The report as adopted by the Conference was first presented to Congress in 1943. The recommendations regarding youth offenders were largely adopted by Congress in 1949 in the bill which became the Youth Corrections Act in 1950.

when special factors operated to produce habitual criminals. Second, then-existing methods of treating criminally-inclined youths were found inadequate in avoiding recidivism. H. R. Rep. No. 2979, 81st Cong., 2d Sess., at 2–3 (1949) (H. R. 2979). The Act was thus designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket, to rehabilitate them and restore normal behavior patterns. *Ibid.*

To accomplish this objective federal district judges were given two new alternatives to add to the array of sentencing options previously available to them, see n. 9, *infra*: first, they were enabled to commit an eligible offender to the custody of the Attorney General for treatment under the Act. 18 U. S. C. §§ 5010 (b) and (c). Second, if they believed an offender did not need commitment, they were authorized to place him on probation under the Act. 18 U. S. C. § 5010 (a). If the sentencing court chose the first alternative, the youth offender would be committed to the program of treatment created by the Act.

The objective of these options represented a departure from traditional sentencing, and focused primarily on correction and rehabilitation. All persons under 22 years of age at the time of conviction were made eligible for probation or treatment under the Act,[9] the latter de-

[9] The Act is ordinarily not applied to convicted persons under the age of 18, who are eligible for sentencing under the provisions of the federal Juvenile Delinquency Act of 1948, 18 U. S. C. § 5031 *et seq.* And certain multiple offenders in the District of Columbia are, despite their qualifying age, barred from sentencing under the Act. 22 D. C. Code § 3202 (d) (1). By contrast, convicted persons between the ages of 22 and 26, termed "young adult" offenders, may be sentenced for treatment under the Act if "the court finds that there is reasonable grounds to believe that the defendant will benefit from" treatment under the Act. 18 U. S. C. § 4209. Of course, adult offenders are eligible for sentencing only under statutory provi-

fined as "corrective and preventive guidance and training designed to protect the public by correcting [their] antisocial tendencies." 18 U. S. C. § 5006 (e) and (g). To implement the program of treatment for youth offenders committed under the Act, a Youth Correction Division was created under the Board of Parole which, in conjunction with the Bureau of Prisons and the Probation Service, operates to provide the unique features of the Act's program. 18 U. S. C. § 5005.

An important element of the program was that once a person was committed for treatment under the Act, the execution of sentence was to fit the person, not the crime for which he was convicted. Classification agencies were to be established by the Director of the Bureau of Prisons to receive and study the person committed and make recommendations to the Director as to appropriate treatment. 18 U. S. C. §§ 5014, 5015. Further, the range of treatment available was made broad to provide maximum flexibility. The Director was authorized both to adapt numerous public facilities, and to contract with public or private agencies, in order to provide institutional treatment which the Director could vary according to the committed person's progress or lack of it. 18 U. S. C. §§ 5011, 5015. An integral part of the treatment program was the segregation of the committed persons, insofar as practicable, so as to place them with those similarly committed, to avoid the influence of association with the more hardened inmates serving traditional criminal sentences. 18 U. S. C. § 5011.

In addition to institutional treatment, the Division was empowered to order conditional release under supervision at any time to those committed under the Act, with fed-

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sions outside those available for juveniles, youth offenders, and young adult offenders.

eral probation officers providing the supervision.[10] 18 U. S. C. §§ 5007, 5017, 5019. Conditional release was mandatory after a period of time fixed by the statutory formula. 18 U. S. C. § 5017. See n. 4, *supra*. The Division was further authorized to order the unconditional discharge of committed persons after a fixed period of treatment, and was required unconditionally to discharge them within a period also fixed by statutory formula. *Ibid.* A powerful tool available to the Division was its discretion to discharge committed persons unconditionally before it was required to do so, for upon such discharge the conviction upon which the sentence rested would be automatically set aside. 18 U. S. C. § 5021 (a). See n. 5, *supra*. Similarly, if the sentencing judge chose the second alternative created by the Act, *i. e.*, placement of the youth offender on probation under its provisions, the judge himself could exercise his discretion to discharge the offender from probation unconditionally. 18 U. S. C. § 5021 (b). See n. 6, *supra*. This, too, would result in the automatic setting aside of the offender's conviction. *Ibid.*

The foregoing describes the new options of treatment and probation made available to the federal sentencing courts under the Act.[11] Our concern is not with the op-

[10] In 1952, Congress amended subsection 5024 of the Act, and added subsections 5025 and 5026, in order to extend the Act's coverage to youth offenders convicted in the District of Columbia. 66 Stat. 45. In 1967 Congress further amended these subsections, withdrawing from the Bureau of Prisons and the Youth Correction Division control of District of Columbia youth offenders during their commitment and after their release. Control during these periods was instead given to the Commissioner of the District of Columbia, who could in turn delegate this authority to the D. C. Department of Corrections, in order to provide continuity of treatment.

[11] In recognition of the difficulty of ascertaining whether, and if so which type of, Act treatment would benefit a youth offender, the Act also permits the sentencing court to commit the offender to one

eration of these alternatives, but with the decision of the court to employ them, for the Act also preserved the power of trial judges to sentence youth offenders under "any other applicable penalty provision." It is to the question of when a judge may sentence a youth offender outside the Act that we now turn.

## III

### *Sentencing Discretion under the Act*

### (A)

The language affecting the sentencing role of the judge under the Act is found in subsection 5010 (d), which tells us:

> "If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c) then the court may sentence the youth offender under any other applicable penalty provision."

Our concern is with the effect of the requirement of a "no benefit" finding on the judge's sentencing discretion.

The legislative history clearly indicates that the Act was meant to enlarge, not restrict, the sentencing options of federal trial courts in order to permit them to sentence youth offenders for rehabilitation of a special sort.

> "The proposed legislation is designed to make available for the *discretionary* use of the Federal judges a system for the sentencing and treatment of [youth offenders] that will promote the rehabilitation of those who *in the opinion of the sentencing judge* show promise of becoming useful citizens .... H. R. 2979, at 1. (Emphasis added.)
>
> "The purpose of the proposed legislation is to provide a *new alternative sentencing* and treatment pro-

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of the above classification agencies where, following observation and study, the Youth Correction Division reports its findings to the court within 60 days. 18 U. S. C. § 5010 (e).

> cedure for [youth offenders]. S. Rep. No. 1180, 81st Cong., 1st Sess., at 1 (1949) (S. R. 1180). (Emphasis added.)

Thus, apart from the discretion vested in administrative agencies for treatment of those committed under the Act, as described in Part II, the Act was intended to broaden the scope of judicial sentencing discretion to include the alternatives of treatment or probation thereunder.

The Act was a product of studies made by a committee of federal judges under the auspices of the Judicial Conference of the United States. The views of the sponsors as to the effect of the Act on the sentencing discretion of the trial courts are thus of particular importance, and they uniformly support the view that the Act was intended to preserve unfettered the sentencing discretion of federal district judges. Most pertinent is the statement made by the Chairman of the Judicial Conference special committee appointed to study punishment for crime, see n. 8, *supra*, Chief Judge John J. Parker, who testified before the Subcommittee of the Senate Judiciary Committee, which conducted the only hearings held on the bill (S. 2609) enacted as the Youth Corrections Act. Judge Parker stated:

> "The act . . . does not interfere with the power of the judge [with respect to sentencing youth offenders] but gives him merely an alternative method of treatment of those people . . . . He may still give the youthful offender the punishment prescribed by existing statutes, there is nothing in the bill that prevents that. All that the bill does is to provide that if in his judgment and discretion, he thinks that the offender before the court is one that can be treated with advantage under this bill, he can sentence him under this bill instead of under existing law. . . .
>
> "I do not see any possible objection [to the Act]. They say that there are some of those fellows that

> ought to be given serious punishment notwithstanding their being young and it [the Act] does not prevent their being given serious punishment. Nothing prevents a man from getting 25 years punishment if he deserves it. Nothing prevents him from being executed if he deserves such sentence." Hearings on S. 1114 and S. 2609, 81st Cong., 1st Sess., at 43–44 (1949) (Hearings).

To the same effect is the statement made by Circuit Judge Orie L. Phillips, the Chairman of the Conference subcommittee which gave particular attention to the treatment of youth offenders. See n. 8, *supra*. In response to the statement of Senator Kilgore, sponsor of S. 2609, that the bill "takes nothing" (in terms of sentencing) "away from the court," Judge Phillips replied: "That is correct; it is purely optional." Hearings, at 69. Earlier Judge Phillips had said of the bill: "That is merely a flexibility and it is not a command that he send the boys up," to which Senator Kilgore replied: "I agree with you on that . . . ." *Id.*, at 67. To the extent other testimony and the debates addressed the question of sentencing discretion under the Act, they invariably reflected the same view,[12] as did the House

[12] The only other judges to testify before the Senate Subcommittee were also in accord. District Judge Carroll Hincks, who served on the Conference subcommittee studying treatment of youth offenders, stated:

"I think when the judges say they are opposed to the predecessor of this bill, if you could talk with them you would find that . . . they would not themselves want to use it. Very well, they do not have to use it." Hearings, at 57.

District Judge Bolitha J. Laws, who served on the Conference special committee studying general punishment for crime, stated:

"I have already told you that this law is a purely optional situation. A judge who feels that the present system is in all respects perfect and who does not want to use the new provisions, except perhaps

Report, quoted above, and the Department of Justice, which recommended enactment of S. 2609 and noted that the bill "would not deprive the court of any of its present functions as to the sentencing." S. R. 1180, at 10–11. The Senate Report's language was identical to that of the Department of Justice.[13] *Id.*, at 1. The legislative history of the Act confirms the conclusion that Congress did not intend to alter or circumscribe the sentencing discretion of federal district judges by requiring any substantive

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rarely, does not have to use them. He still may do one of two things. He may admit the man to probation; or he may send him to an institution exactly as he now does." *Id.*, at 15.

Mr. James V. Bennett, Director, Bureau of Prisons, testified similarly:

"I would like to . . . reemphasize more than Judge Laws has done, that this bill is discretionary . . . it is very difficult for one to conceive of anybody who could rightfully object to the bill because they can use it or not, as they see fit . . . ." *Id.*, at 25.

During the Senate debate over the bill, Senator Kilgore made clear his position of the matter of sentencing discretion under the bill:

"Its purpose is to grant to trial courts . . . some additional facilities . . . to try certain correctional methods. Use of the system provided by this measure would not be mandatory." 96 Cong. Rec. 8267, 81st Cong., 2d Sess. (1950).

There was no discussion of sentencing discretion by anyone other than Senator Kilgore in either the Senate or House debates.

[13] The Senate Report also noted that the sentencing judge may sentence a youth offender under applicable provisions other than the Act if, after receiving a pre-sentence diagnosis under 18 U. S. C. § 5010 (e), see n. 11, *supra*, he is convinced the youth is "incorrigible and would derive no help from the program." S. R. No. 1180, at 5. The remark was made in the context of a discussion concerning the need sentencing judges have for additional information about youth offenders they must sentence, and indicated merely that temporary commitment under subsection 5010 (e) would not deprive the judge of the discretion to sentence the youth outside the Act, citing illustratively to the prototype of youth offender whom judges would not likely desire to sentence under the Act.

standard be met before the imposition of sentence. There is virtual unanimity of opinion in the legislative history that the Act was intended to increase the sentencing options of federal trial judges, rather than to limit the exercise of their discretion whether to employ the newly created options.

To construe subsection 5010 (d)'s requirement of a "no benefit" finding to circumscribe that discretion would be incompatible with a clear congressional intent; such a construction would also be at odds with traditional sentencing doctrine. The intent of Congress was in accord with long-established authority in the United States vesting the sentencing function exclusively in the trial court.[14]

> "If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Gurrera* v. *United States*, 40 F. 2d 338, 340 (CA8 1930).

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[14] To the extent reference was made to the English Borstal system for treating young offenders in drafting the Act, that reference did not include the English view of the trial court's discretion to make use of that system. Circuit Judge (now Chief Judge) Kaufman of the Court of Appeals for the Second Circuit has stated:

"At present the United States is the only nation in the free world where one judge can determine conclusively, decisively and finally the minimum period of time a defendant must remain in prison, without being subject to any review of his determination." Symposium, Appellate Review of Sentencing, 32 F. R. D. 257, 260–261 (1962).

Professor Sanford H. Kadish also notes that in the United States, the "discretion of the judge . . . in [sentencing] matters is virtually free of substantive control or guidance," Kadish, Legal Norm and Discretion in the Police and Sentencing Process, 75 Harv. L. Rev. 904, 915 (1962). We are unwilling to ascribe to the Congress an intent to import, *sub silentio*, sentencing doctrine contrary to traditional powers of sentencing judges.

See *Gore* v. *United States, supra; Townsend* v. *Burke, supra; Blockburger* v. *United States, supra.*

The statutes referred to in this line of cases established a permissible range within which sentences could be imposed; if a court imposed a sentence within that range, his exercise of discretion as to where within the permissible range sentence should be fixed was not subject to challenge. The authority to sentence a youth offender under "any other applicable penalty provision" is expressly reserved to federal trial courts by subsection 5010 (d), and thus is within the permissible range of sentences which may be imposed under the Act. The "no benefit" finding required by the Act is not to be read as a substantive standard which must be satisfied to support a sentence outside the Act, for such a reading would subject the sentence to appellate review even though it was permitted by the Act's terms, thereby limiting the sentencing court's discretion. We will not assume Congress to have intended such a departure from well-established doctrine without a clear expression to disavow it. As our review has shown, the exclusive sentencing power of district judges was acknowledged, and Congress' intention to affirm that power was clearly indicated.

From our conclusion that a finding of "no benefit" was not intended to constitute a substantive standard, it follows that a sentence outside the Act need not be accompanied by a statement of reasons why the court chose such a sentence. The only purpose of such a requirement would be to facilitate appellate supervision of, and thus to limit, the trial court's sentencing discretion.[15] In short,

[15] Judge Marvin E. Frankel (SDNY) has recently stated that while judges are required to explain other rulings, see, *e. g.*, Fed. Rule Civ. Proc. 52 (a), "[t]here is no such requirement in the announcement of a prison sentence." Frankel, Lawlessness in Sentencing, 41 U. Cinn. L. Rev. 1, 9 (1972). It would have been a very

we hold that the discretion vested in a district judge under subsection 5010 (d) is essentially the same as the traditional discretion vested in the court, for example, to impose the minimum sentence on a first offender or a larger sentence on a recividist. If the failure of a court to sentence a particular youth offender under the Act appears "too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction," *Blockburger, supra,* 284 U. S., at 299, since "whatever views may be entertained regarding severity of punishment . . . [t]hese are peculiarly questions of legislative policy." *Gore, supra,* 357 U. S., at 393.

(B)

Although the Act was not in any way intended to circumscribe the discretion of sentencing courts, it did provide a new sentencing alternative designed to prevent youthful offenders from continuing their involvement in criminal conduct after the expiration of their sentence. In the novelty of the treatment option made available, and the importance of the objective it was to serve, lies the purpose of subsection 5010 (d)'s requirement that the court find "no benefit" before imposing a sentence other than one under 18 U. S. C. §§ 5010 (b) or (c).

Although well-established doctrine bars review of the exercise of sentencing discretion, limited review is available when sentencing discretion is not exercised at all. *Yates* v. *United States,* 356 U. S. 363, 366–367 (1958);

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simple matter for Congress to have included a statement in subsection 5010 (d) that the sentencing court's determination of no benefit must be supported by reasons, as was required by the proposal regarding adult offenders, before the Congress in 1943, S. 895, 78th Cong., 1st Sess., Title II, § 1. See n. 8, *supra.* Congress' failure to so provide in subsection 5010 (d) strengthens our view that it intended no new appellate encumbrance upon the sentencing process.

*United States* v. *Daniels*, 446 F. 2d 967, 972 (CA6 1971); *United States* v. *Williams*, 407 F. 2d 940, 945 (CA4 1969). See also n. 7, *supra*. The requirement of the "no benefit" finding was designed to insure that the sentencing judge exercised his discretion in choosing not to commit a youth offender to treatment under the Act. Such a finding would make unmistakably clear that the sentencing judge was not only aware of the existence of the new Act, but also knew that the youth offender before him was eligible because of his age for the treatment it provided to accomplish its important purpose.

> "Appellate modification of a statutorily-authorized sentence . . . is an entirely different matter than the careful scrutiny of the *judicial process* by which the particular punishment was determined. Rather than an unjustified incursion into the province of the sentencing judge, this latter responsibility is, on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases." *United States* v. *Hartford*, 489 F. 2d 652, 654 (CA5 1974). (Emphasis in original.)

Once it is made clear that the sentencing judge has considered the option of treatment under the Act and rejected it, however, no appellate review is warranted.

The question whether the finding of "no benefit" must be explicit or whether it may be implicit in the record of a particular case, is answered by the manifest desire of Congress to assure that treatment under the Act be considered by the court as one option whenever the youth offender is eligible for it. If the finding may be implied from the record appellate courts must go on to determine what constitutes a sufficent showing of the requisite implication. To hold that a "no benefit" finding is implicit each time a sentence under the Act is not chosen would render subsection 5010 (d) nugatory; to hold that

something more is necessary to support the inference that must be found in the record would create an *ad hoc* rule. Appellate courts should not be subject to the burden of case-by-case examination of the record to make sure that the sentencing judge considered the treatment option made available by the Act. Literal compliance with the Act can be satisfied by any expression that makes clear the sentencing judge considered the alternative of sentencing under the Act and decided that the youth offender would not derive benefit from treatment under the Act.

This case provides an example of the problems arising when the required finding is left to implication. Counsels' references to the Act followed by the District Court's sentence indeed afford support for the argument that by implication, the options of the Act were considered and rejected. However at the post-conviction hearing the District Court found from the record of the sentencing hearing the implication that the Act was "not applicable." It is thus unclear whether this meant the court believed petitioner to be legally ineligible for treatment under the Act—which would be error—or whether, realizing he was eligible, nevertheless deliberately opted to sentence him as an adult. An explicit finding that petitioner would not have benefited from treatment under the Act would have removed all doubt concerning whether the enlarged discretion Congress provided to sentencing courts was indeed exercised.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to the end that the District Court conduct further proceedings consistent with this opinion.

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 73–5284

Douglas Dorszynski, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 26, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART join, concurring in the result.

The Court is today called upon to construe the provision of the Youth Corrections Act, 18 U. S. C. §§ 5005 *et seq.*, defining the circumstances under which a youth offender may be sentenced as an adult. The Youth Corrections Act (YCA) provides a comprehensive sentencing scheme for offenders between the ages of 18 and 22, affording trial judges four options for sentencing such offenders. The judge may suspend imposition or execution of sentence and place the offender on probation. 18 U. S. C. § 5010 (a). Alternatively, the judge may sentence the offender for treatment and supervision at a special youth facility, to be discharged in no more than 6 years, 18 U. S. C. § 5010 (b), or he may commit the offender to a youth institution for a term which may exceed 6 years, up to the maximum period authorized by law for the offense. 18 U. S. C. § 5010 (c).[1] Finally, the judge may sentence the offender as an adult, pursuant to 18 U. S. C. § 5010 (d), which provides that:

"If the court shall find that the youth offender will not benefit from treatment under subsection (b) or

[1] The actual duration of the treatment period is determined by the Youth Corrections authorities. 18 U. S. C. § 5017.

(c), then the Court may sentence the youth offender under any other applicable penalty provision."

I agree with the Court's holding that § 5010 (d) requires an explicit finding of "no benefit" as a condition precedent to sentencing an eligible offender as an adult, *ante*, at 20, but I find that holding patently inconsistent with the Court's assertion that a sentencing judge need only be aware of the applicability of the Act and choose to reject it in order to satisfy the clear admonition of § 5010 (d). As construed by the Court, the "no benefit" finding is not a finding at all.

I am convinced that the Act was meant to "provide a *preferred* sentencing alternative which must be used in sentencing a youthful offender unless, in the language of § 5010 (d), 'the court shall find that the youth offender *will not derive benefit* from treatment . . .'" under the Act. *Cox* v. *United States*, 473 F. 2d 334, 337 (CA4 1973) (en banc) (emphasis added). And, I fundamentally disagree with the Court's holding that merely by tracking the statutory "no benefit" language a sentencing judge can satisfy the "finding" requirement of § 5010 (d). I would require that the explicit "no benefit" finding be augmented by a statement of the reasons for imposing an adult sentence.

I

I find no basis in either the language or history of the YCA to support the Court's observation that the Act was intended to "preserve unfettered" the discretion of the sentencing judge. *Ante*, at 13. The Youth Corrections Act was the product of more than 10 years of study by various groups and was modeled after the British Borstal system, which had achieved substantial success in rehabilitating young offenders.[2] The initial legisla-

[2] H. R. Rep. No. 2979, 81st Cong., 2d Sess., 3–6 (1950).

tive proposal, an ALI model act, removed the power to sentence eligible offenders from the trial judges altogther and reposed that power in a correctional authority.[3] Not surprisingly, that proposal brought swift and sharp criticism from the judges whose power was to be sharply curtailed. The next proposal, by the Judicial Conference, involved shared sentencing powers between trial judges and correctional authorities.[4] It met with similar criticism. The 1949 proposal, which was finally enacted into law, retained sentencing power in the trial judge. As the Court today points out, the drafters of the Act repeatedly emphasized that the legislation "does not interfere with the [sentencing] power of the judge . . . ." *Ante,* at 13–14.

But even the very first Judicial Conference proposal contained a provision specifically requiring the trial judge to make a finding that a youth offender would not benefit from treatment and should not be committed under the Act, before sentencing him under any other penalty provisions.[5] This finding requirement was adapted from the similar Borstal provision which disallows a sentencing court from ". . . impos[ing] imprisonment on a person under 21 years of age unless . . . no other [Borstal] method of dealing with him is appropriate . . . ."[6] The finding requirement of the Judicial Conference draft was not subject to the same criticism as the provisions which actually removed, rather than limited, the exercise of trial judges' sentencing discretion, and the finding requirement was ultimately enacted into law as § 5010 (d).

The finding requirement is an integral part of the Youth Corrections scheme. The stated premise of the

[3] ALI, Model Youth Correction Authority Act §§ 13 and 30 (Official Draft 1940); *id.,* comment, at 35–36.

[4] H. R. 2140, 78th Cong., 1st Sess., Tit. II, § 3 (1943).

[5] *Id.,* Tit. III, § 1 (c).

[6] Criminal Justice Act of 1948, § 17 (2).

Act is that young people between the ages of 18 and 22, especially, are hopeful subjects for rehabilitation.[7] The purpose of the legislation was, for those offenders, to "substitute for retributive punishment, methods of training and treatment designed to correct and prevent antisocial tendencies. It departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation." H. R. Rep. No. 2979, 81st Cong., 2d Sess., 3 (1950).[8] It is clear that from its very inception, the Youth Corrections program was intended to establish among the goals judges could consider in sentencing eligible offenders, one as paramount—that of rehabilitation.[9] And, in this limited sense, the sentencing discretion of trial judges is necessarily circumscribed in regard to youth offenders. The finding requirement of § 5010 (d) effectuates this policy by permitting eligible offenders to be deprived of the rehabilitative treatment provided under the Act only where they would not benefit therefrom.

The Senate Report accompanying the bill explained the circumstances under which adult sentencing would be proper:

> "If . . . the judge is convinced the youth is incorrigible and would derive no help from the program, he may sentence him under any applicable provision of law. S. Rep. No. 1180, 81st Cong., 1st Sess., 5 (1949).

Other aspects of the legislative history underscore Con-

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[7] H. R. Rep. No. 2979, 81st Cong., 2d Sess., 1–4 (1950).

[8] Although the rehabilitative model of corrections has recently been subject to criticism, the fact remains that Congress established a clear preference for the objective of rehabilitation in enacting the Youth Corrections Act.

[9] See, *e. g.*, *United States* v. *Kaylor*, 491 F. 2d 1133, 1136 (CA2 1974) (en banc); *United States* v. *Waters*, 141 U. S. App. D. C. 289, 293, 437 F. 2d 722, 726 (1970); *Carter* v. *United States*, 113 U. S. App. D. C. 123, 125, 306 F. 2d 283, 285 (1962).

gress' intention that the Act provide a preferred sentencing alternative for eligible offenders. Senator Kilgore, one of the sponsor of the legislation, observed that given the requisite finding "only about 10 percent of [eligible offenders would] eventually have to [be] sentence[d as adults], or less." Hearings on S. 895 before Subcommittee of the Committee on Judiciary, 78th Cong., 1st Sess., 13 (1943). The House Report concluded that even given the instances in which YCA rehabilitative treatment would fail "more than 70 percent [of eligible youth offenders] can be rehabilitated under the Act." H. R. Rep. No. 2979, 81st Cong., 2d Sess., 10 (1950). The panoply of treatment options [10] available under the Act is but further evidence that the YCA program was intended to be sufficiently comprehensive to deal with all but the "incorrigible youth."

This congressional intent finds clear expression in the words of the statute. Section 5010 (d) does not say the sentencing court must merely consider the treatment option provided by the Act; it says in the most uncompromising terms that the court must find the youth "will not benefit" from YCA treatment as a prerequisite to imposing an adult sentence. The use of the words "shall find" emphasizes the mandatory nature of that finding. The specific quality of the finding is underscored by § 5010 (e) which provides for an eligible offender to be temporarily committed for observation and study for the purpose of providing the sentencing court with a report

[10] Emulating the Borstal system, Congress authorized a comprehensive youth corrections system, making a wide range of treatment options available to youth offenders. It mandated that maximum, medium, and minimum security institutions be utilized, 18 U. S. C. § 5011, that long and short term treatment be provided, compare 18 U. S. C. § 5010 (b) with 18 U. S. C. § 5010 (c), and that a wide range of treatment services be available. 18 U. S. C. § 5011; 18 U. S. C. § 5015.

on the particular question defined by § 5010 (d)—whether the youth offender would benefit from treatment under the Act.[11]

Thus, while the Act does not remove a trial judge's responsibility or discretion for the sentencing determination, it does provide a preferred disposition for eligible offenders. A sentencing judge is not required to sentence a youth offender under the Act; the judge can still exercise his "sound discretion to deny such rehabilitative treatment to those youths in the exceptional cases where the judge determines that the special youth treatment afforded by the Act would be of no value." *United States* v. *Waters*, 141 U. S. App. D. C. 289, 291, 437 F. 2d 722, 724 (1970). The legislative history relied on by the Court merely emphasizes this point—that the Act was intended to be another sentencing alternative available to the trial judge and that the decision as to whether it should be employed in a particular case remains a decision committed to his discretion. That history is not, however, inconsistent with what seems to me the plain meaning of the words of the statute—that the sentencing judge's discretion is circumscribed by the affirmative finding requirement of § 5010 (d).[12]

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[11] "If the court desires additional information *as to whether a youth offender will drive benefit from treatment* under subsections (b) or (c) it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within 60 days from the date of the order, or such additional period as the court may grant, the Division shall report to the court its findings." 18 U. S. C. § 5010 (e) (emphasis added).

[12] An unsuccessful effort to remove these bonds on the discretion of sentencing judges was made in 1972, when a bill was introduced to amend 18 U. S. C. § 5010 (d) to provide that:

"Nothing in this chapter shall be construed to preclude the court, in any case, from sentencing a youth offender under any other

The YCA "prcvide[s] a preferred sentencing alternative" which must be used in sentencing a youth unless the facts of the individual case meet the statutory requirement—unless, in the language of § 5010 (d), the court finds that the youth offender will not derive benefit from treatment under the Act.[13] *Cox* v. *United States*, 473 F. 2d 334, 337 (CA4 1973) (en banc); *United States* v. *Waters*, 141 U. S. App. D. C. 289, 292–293, 437 F. 2d 722, 725–726 (1970). Every Court of Appeals which has considered the issue, except the court below, has agreed that the manner in which the sentencing judge exercises his discretion is thus limited. *Brooks* v. *United States*, — F. 2d — (CA6, No. 73–2195, May 31, 1974); *United States* v. *Kaylor*, 491 F. 2d 1133 (CA2 1974) (en banc); *United States* v. *Schenker*, 486 F. 2d 319 (CA5 1973); *United States* v. *Coefield*, — U. S. App. D. C. —, 476 F. 2d 1152 (1973) (en banc); *Cox* v. *United States*, *supra*; *Williams* v. *United States*, 476 F. 2d 970 (CA3 1973); See *United States* v. *MacDonald*, 455 F. 2d 1259, 1265 (CA1 1972);[14] cf. *Small* v. *United States*, 304 A. 2d 641 (D. C. Ct. App. 1973).

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applicable penalty provision." S. 3290, 92d Cong., 2d Sess. (1972); see 118 Cong. Rec. 6776–6788 (March 3, 1972).

The proposed amendment was not enacted.

[13] The requirement of a positive finding of "no benefit" to support an adult sentence under § 5010 (d) is merely the obverse of the requirement of 18 U. S. C. § 4209 that as a prerequisite to Young Adult Offender sentencing the sentencing "court finds that there is reasonable grounds to believe that the defendant will benefit from [such] treatment . . . ." See *United States* v. *Kaylor*, 491 F. 2d 1133, 1137 (CA2 1974) (en banc).

[14] Subsequently in *United States* v. *Walker*, 469 F. 2d 1377 (CA1 1972), the Court of Appeals for the First Circuit agreed that the Act precluded adult sentencing where the offender would derive benefit from treatment under the Act, but found it clear from the nature of the offenses involved that the defendant had no antisocial tendencies to be corrected, hence no benefit to be derived from Youth Act treatment. 469 F. 2d, at 1381 n. 4.

In a sense, the Court today also recognizes the inherent limitation on the judge's discretion imposed by § 5010 (d) by requiring an explicit "no benefit" finding as a prerequisite to adult sentencing. As conceived by the Court, however, the required "no benefit" finding is no finding at all, but merely a ritualistic invocation of the statutory language. In explaining why the "no benefit" finding must be explicit, the Court notes that "to hold a 'no benefit' finding is implicit each time a sentence under the Act is not chosen would render § 5010 (d) nugatory." *Ante*, at 19. Despite these protestations, the Court today renders the finding requirement of § 5010 (d) a nullity. By holding that the Act was intended to preserve "unfettered the sentencing discretion of federal district judges," *ante*, at 13, and that sentencing judges need only have "considered the option of treatment under the Act and rejected it," *ante*, at 19, the Court effectively reads the unambiguous mandate of a "no benefit" finding out of the Act. A mere parroting of the statutory language is hardly an affirmative finding. The Court's opinion seems to indicate that the sentencing judge need not mean what he says when he pronounces the "no benefit" litany. Although the Court requires him to go through the charade of saying that the offender would not benefit from treatment under the Act, it apparently does not require that the judge actually find no benefit but only that he be aware of the Act and reject it. I think it remarkable that this Court should approve such an empty and duplicitous ritual.

II

If the Court were to hold that the Act limited a trial judge's discretion by requiring that he actually find a youth offender would not benefit from YCA treatment before sentencing him as an adult, I would think that more than a mere recitation of the conclusory finding of "no benefit" should be required. To say that simply in-

voking the words of the statute satisfies the mandate of § 5010 (d) affords far too little credence both to Congress' deep concern for the rehabilitative potential of young offenders and to its obvious intention that eligible offenders be sentenced under the Act if they would benefit from its rehabilitative programs. To give effect to these concerns, I would require that the trial judge include, on the record, a statement which makes clear that he considered the provisions of the Act, weighed the treatment option available, and decided in light of his familiarity with the offender, that he would not derive benefit from treatment under the Act.[15]

The mere recitation of the "no benefit" litany can hardly bear the weight of demonstrating such compliance. By taking the unusual step of requiring a specific finding in this limited but highly important area of sentencing, Congress mandated a reasoned determination that the offender would not benefit from the rehabilitative treatment available under the Act. Accordingly, in my view, a statement of the factors which informed and shaped the sentencing decision must accompany the conclusory finding of "no benefit" if that congressional purpose is to be served.

The Borstal system, which provided the model for the Youth Corrections scheme in general and the requirement of § 5010 (d) in particular, envisions a trial judge stating his reasons for sentencing an eligible offender as an adult.[16] Similarly, most of the court of appeals which

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[15] See *United States* v. *Brooks*, — F. 2d — (CA6, No. 73-2195, May 31, 1974) slip op., at 6; *United States* v. *Kaylor*, 491 F. 2d 1133, 1139 (CA2 1974) (en banc); *United States* v. *Coefield*, — U. S. App. D. C. —, 476 F. 2d 1152, 1157–1158 (1973) (en banc).

[16] Criminal Justice Act of 1948, § 17 (3). The Court asserts, *ante*, at 16 n. 14, that the reference to the English Borstal system made in drafting the Act "did not include the English view of the trial court's discretion to make use of that system." To

have faced the issue, have required a statement of reasons as a necessary concomitant of the § 5010 (d) finding. A unanimous en banc decision of the Court of Appeals for the Second Circuit and a near unanimous en banc decision of the Court of Appeals for the District of Columbia Circuit [17] have found a statement of reasons supporting the "no benefit" finding to be "necessary to a knowledgeable administration of the Act . . . ." *United States* v. *Kaylor*, 491 F. 2d 1133, 1139 (CA2 1974); *United States* v. *Coefield*, 476 F. 2d 1152, 1157 (CA2 1973) (en banc). The Court of Appeals for the Sixth Circuit has, more recently, held that a statement of reasons accompanying adult sentencing is "necessary to insure that the sentencing court . . . has deliberately considered whether a youth offender may benefit from the treatment provided for in the Act . . . ." *Brooks* v. *United States*, — F. 2d — (CA6, No. 73–2195, May 31, 1974), slip op., at 6. Similarly, the Court of Appeals for the Fourth Circuit recently remanded a case for consideration of whether treatment under the Act would be beneficial to the offender and specifically ordered the trial judge to state the reasons for his conclusion. *Cox* v. *United States*,

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support this claim, the Court relies on two general descriptions of American sentencing procedures made a decade after enactment of the legislation. Those comments were not directed to the administration of the Youth Corrections Act, hence their validity as indicia of congressional intent in this limited context is questionable at best.

On the other hand, there is considerable evidence that the Borstal system did, in fact, provide a model on the question of the trial court's sentencing discretion, not the least of which is the marked similarity between 18 U. S. C. § 5010 (d) and Criminal Justice Act of 1948, § 17 (2), both of which require a no benefit finding as a prerequisite to adult sentencing.

[17] Only Judge Mackinnon, of the 10 participating judges on the Court of Appeals for the District of Columbia Circuit, dissented from that court's en banc decision in *Coefield*, *supra*.

473 F. 2d 334, 337 (CA4 1973) (en banc). In fact, the Court below is the only Court of Appeals to specifically disavow a requirement of reasons for a § 5010 (d) sentence.[18]

Contrary to the Court's assertion that appellate review is the only purpose to be served by a statement of reasons, that requirement serves a number of other important policies. First, it might well contribute to rationalizing the sentencing process and to decreasing disparities in sentences. Articulating reasons should assist a trial judge in developing for himself a consistent set of principles on which to base his sentencing decisions. Requiring "[s]uch a procedure would encourage the judge to clarify and justify, in his own mind, the grounds for the sentence he chooses. As a result, sentencing decisions would tend, on the whole, to be more carefully thought out." *United States* v. *Velazquez*, 482 F. 2d 139, 142 (CA2 1973); accord, *United States* v. *Brown*, 479 F. 2d 1170, 1172 (CA2 1973).

The reasons may also be of use to correctional authorities in their handling of the prisoner after sentence. The kind of correctional and rehabilitative treatment

[18] The First Circuit in *United States* v. *MacDonald*, 455 F. 2d 1259 (CA1 1972), remanded a case to the District Court "to make the findings required by the Federal Youth Corrections Act," leaving unclear whether those findings encompassed a statement of reasons. The Third Circuit specifically reserved the issue in *Williams* v. *United States*, 476 F. 2d 970 (CA3 1973). The Fifth Circuit, in its only case on the issue remanded for appropriate findings under § 5010 (d) without explanation as to whether an ultimate finding of no benefit was alone sufficient. *United States* v. *Schenker*, 486 F. 2d 318 (CA5 1973). A case specifically dealing with the reasons requirement, *Hoyt* v. *United States*, No. 73-2435, is presently pending before the Fifth Circuit. The Ninth Circuit called for an express no benefit finding but has not faced the question of whether reasons are required in support thereof. *Jarrat* v. *United States*, 471 F. 2d 226 (CA9 1972).

an offender receives should take into account the reasons for his sentence.

A disclosure of reasons may also aid the defendant's counsel to insure that the sentence is not premised on misinformation or inaccuracies in the material upon which the sentencing judge relies. "A Sphinx-like silence on the court's part precludes anyone (including the parties, [and] the judge . . .) from learning whether he acted in error." *United States* v. *Brown, supra*, at 1172–1173; cf. *United States* v. *Tucker*, 404 U. S. 443 (1972).

Moreover, an articulation of reasons may actually contribute to the offender's rehabilitation by avoiding any feeling that his sentence was arbitrary.[19] As MR. JUSTICE STEWART observed as an appellate judge:

> "Justice is measured in many ways, but to a convicted criminal its surest measure lies in the fairness of the sentence he receives . . . . It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this important dimension of fundamental justice." *Shepard* v. *United States*, 257 F. 2d 293, 294 (CA6 1958).

If reasons were articulated for the sentencing decision, an offender would be less apt to perceive his fate as being arbitrarily determined.[20] Reasoned decisions may even

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[19] A leading federal district judge has observed that, "[t]he absence of any explanation or purported justification for the sentence is among the more familiar and understandable sources of bitterness among people in prison." M. Frankel, Criminal Sentences, Law Without Order 42–43 (1972).

[20] There may, of course, be circumstances in which it would not be advisable to state the reasons underlying imposition of a particular sentence in the presence of the defendant, in which case those reasons could instead be committed to writing and made part of the record.

enhance the legitimacy of the sentencing process as perceived by the general public for, as noted by the Report of the American Bar Association Project on Minimum Standards for Criminal Justice:

> "It is hardly commanding of public respect for our system on the one hand to increase the alternatives of the sentencing judge so that he can shape his sentence to fit each case, and on the other hand to take the position that he need not explain why he selects a particular sentence . . . ." [21]

Although these considerations apply to sentencing decisions generally,[22] I do not mean to suggest that reasons are required in any other sentencing context. Contrary to the majority's accusations, my view of the Act does not require wholesale abandonment of "traditional sentencing doctrine." *Ante*, at 16. We are concerned here with only a limited albeit important area of sentencing for

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[21] American Bar Association, Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, at 2–3 (App. Draft 1968).

[22] For a general discussion of the value of a statement of the reasons underlying the imposition of sentence, see *United States* v. *Phillips*, — U. S. App. D. C. —, 479 F. 2d 1200 (1973); *United States* v. *Velazquez*, 482 F. 2d 139, 142–143 (CA2 1973); *United States* v. *Brown*, 479 F. 2d 1170, 1172 (CA2 1973); American Bar Association, Project on Minimum Standards for Criminal Justice, Standards relating to Sentencing Alternatives and Procedures, § 5.6 (ii) and commentary (b), at 270–271 (App. Draft 1968); American Bar Association, Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences § 2.3 (e) and commentary (c), at 45–47 (App. Draft 1968); M. Frankel, Criminal Sentences, Law Without Order 39–49 (1972); R. Goldfarb & L. Singer, After Conviction 191–195 (1972); Wyzanski, A. Trial Judge's Freedom and Responsibility, 65 Harv. L. Rev. 1281, 1292–1293 (1952); Youngdahl, Opening the Sentencing Institute Program, Denver, Colorado, 35 F. R. D. 387, 388 (1964); cf. *North Carolina* v. *Pearce*, 395 U. S. 711, 726 (1969); *Kent* v. *United States*, 383 U. S. 541, 561 (1966).

which Congress has established special rules. Congress' urgent concern for the rehabilitative potential of young offenders and the specific finding requirement of § 5010 (d) make the need for reasons particularly compelling in this context. Requiring a statement of reasons would encourage trial judges to direct their attention to the crucial questions of benefit and treatment, to take a hard look at the relevant factors and to focus on value judgments inherent in their sentencing decision. See *United States* v. *Phillips*, — U. S. App. D. C. —, 479 F. 2d 1200 (1973). It is clearly consonant with the Act to require such reasoned consideration. I must agree with the perceptive observations of Senior Judge Fahy of the District of Columbia Circuit that requiring a statement of reasons is essential to assure:

> "firstly, that the District Judge manifest not only an awareness that the Act is applicable to the case, but also an accurate understanding of the scope of his discretion under the Act; secondly, that the District Judge has been informed of the pertinent facts relating to the individual defendant before him, either by evidence coming to his attention in the trial, by a presentence report, or by a recommendation and report made under section 5010 (e); and thirdly, that the District Judge, by his statement of reasons where required, has given consideration and related the facts of the individual case to the applicable law." *United States* v. *Coefield*, — U. S. App. D. C. —, 476 F. 2d 1152, 1157–1158 (1973) (en banc) (footnote omitted).

Section 5010 (e) of the Act provides a mechanism for the trial judge to secure the expert assistance of correctional authorities in determining whether an eligible offender would benefit from treatment. I agree with the

two courts of appeals which have passed on the issue that:

> "[W]hen a judge has availed himself of the assistance afforded by § 5010 (e), that is to say where he has ordered the youth offender committed . . . for observation and study . . . and the Division has made its report to the court, and after considering the report has followed its findings or recommendation in imposing sentence, additional reasons are not required to be stated, although, of course, the judge is not prevented from stating his own reasons." *United States* v. *Kaylor,* 491 F. 2d 1133, 1139 (CA2 1974) (en banc); accord *United States* v. *Coefield,* — U. S. App. D. C. —, 476 F. 2d 1152, 1157 (1973) (en banc).

But the Act clearly intended that the ultimate sentencing decision remain with the trial judge. That decision should not pass by abdication to the correctional authorities who prepare the § 5010 (e) study. Thus, where a trial judge secures a § 5010 (e) report, he should adopt its reasons as his own only after assuring himself of the adequacy of the report and propriety of its recommendation.[23]

I see no reason to reach here the issue of appellate review of the District Court's imposition of an adult sentence. I believe that the Youth Corrections Act provides a preferred sentencing alternative which can only be abandoned on the basis of a finding that an eligible offender will not benefit from treatment under the Act. The District Court imposed sentence on the assumption that the YCA was not a preferred disposition and no find-

[23] See, *e. g., United States* v. *Norcome,* — F. Supp. — (D. D. C., Crim. No. 2047–72, May 2, 1974); *United States* v. *Tillman,* — F. Supp. — (D. D. C., Crim. No. 935–70, March 14, 1974).

ing was required. The Court today finds the District Court's sentence invalid only for failure to make the required "no benefit" finding. Under either the Court's view or my own, the appellate review question is clearly not yet presented by this case.[24]

Accordingly, I concur in the judgment of the Court insofar as it reverses and remands because the District Court failed to make the requisite "no benefit" finding. I disagree, however, with the opinion of the Court insofar as it suggests that a merely conclusory statement of "no benefit" satisfies the statutory requirement and insofar as it purports to pass, albeit in dicta, on the question of appellate review of a § 5010 (d) adult sentence, an issue not before this Court.

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[24] Respondent agrees that should this Court determine that Youth Corrections is a preferred sentencing alternative for eligible offenders, then the Court need not reach in this case the issue of appellate review since the District Court never considered itself bound by such a standard. Respondent's brief, at 40–41.